

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**



# 74-2484

*To be argued by*  
HERBERT A. LYON

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**United States Court of Appeals  
FOR THE SECOND CIRCUIT**

**Docket No. 74-2484**

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UNITED STATES OF AMERICA,

*Appellee,*

—v.—

FRANK J. BRASCO,

*Defendant-Appellant,*

JOSEPH BRASCO,

*Defendant.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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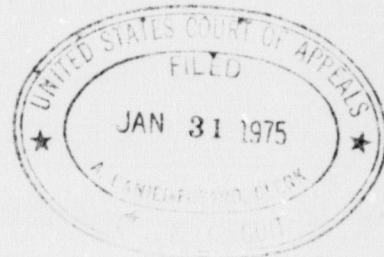
**DEFENDANT-APPELLANT'S BRIEF**

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74-2484

Re: United States of America  
v Frank J. Brasco  
Docket No. 74-2484

CORRECTIONS OF TYPOGRAPHICAL ERRORS

<u>Item</u>	<u>Page</u>	<u>Line</u>
After the words, "in June of 1967", the following footnote should have been picked up: This date was re-constructed from documents in the case.	7	Third line from bottom
After the words, "in June of 1967", the same footnote that was omitted from page 7 of the brief (just given above) should be added.	14	First new paragraph - top line thereof
Instead of the words, "his office", the word "he" should appear.	31	Six lines from bottom of text
The words, "in 1967" should be taken out; instead, add "in or about 1964".	33	Ten
Instead of the words "sealed the Masiello testimony", the words "sealed the jury from the publicity" should appear.	66	Seven
Instead of "1956", it should have read "1959".	73	Seventh line from the bottom
After the words " <u>fait accompli</u> ", there should have been a double asterisk (**) rather than a single one. Our intention was that at this point in the reading, the second footnote appearing on the bottom of page 82 would be picked up.	82	Eight
The page "404" referred to, relates to the sentencing minutes and not to the trial minutes.	96	Twelve
Instead of a "three" retrial, it should have read 4-5 week trial.	98	Three lines from bottom
The word, "never" comes out; it should read "ever".	111	Four

<u>Item</u>	<u>Page</u>	<u>Line</u>
Reference is made to United States of America v Marando, Docket No. 73-1908. Add to this Docket No. 73-1936; also, facts are set forth in bail application made on Marando's behalf under Docket No. 73-2139.	119	Six
After the word "testimony" an asterisk (*) should have appeared, and the following footnote should have been picked up: * This refers to Congressman Brasco's F.B.I. statement only.	122	Last line
Instead of "1967", it should have read "1965".	136	Fifteen
The word "rational" is a typographical error; it should read "national".	139	Two

Re: United States of America  
v Frank J. Brasco  
Docket No. 74-2484

CORRECTIONS OF BRIEF CITATIONS

<u>Corrected Citations Appearing In the Table of Authorities</u>	<u>Cited at Page of the Brief</u>
Baker v. Hudspeth, 129 F.2d 779 (10th Cir., 1942)...	48, 51, 52, 53
Bractcher v. United States, 149 F.2d 742 (4th Cir., 1945).....	61
Cavness v. U.S., 167 F.2d 719 (9th Cir., 1951).....	50
Garello v. State, 20 S.W. 179 (Texas 1892).....	135
Governor of Virgin Islands v. Aquino, 378 F.2d 540 (3rd Cir., 1967).....	116
In Re Murchison, 349 U.S. 133 (1955).....	138
Lee v. State, 258 S.2d 743 (Ct. Cr. Ap. Ala. 1972)..	48, 49, 55
Mattox v. U.S., 146 U.S. 140 (1892).....	59, 64, 70
Motes v. U.S., 178 U.S. 458 (1900).....	112, 116, 121
People v. Leyra, 1 N.Y.2d 199.....	123
United States v. Bridges, 499 F.2d 179 (7th Cir., 1974).....	124
United States v. Bryan, 339 U.S. 323 (1950).....	115
United States v. Casey, 428 F.2d 229 (5th Cir., 1970).	106
United States v. Feinberg, 383 F.2d 60 (2nd Cir., 1967).....	94
United States v. Giacalone, 477 F.2d 1273 (6th Cir., 1973).....	94
United States v. Gilbert, 25 F. Cases 1287 (No. 15, 204) C.C.D. Mass. 1834.....	51
United States v. Johnson, 371 F.2d 800 3rd Cir., 1967).....	106

United States v. Knohl, 379 F.2d 427 (2nd Cir., 1967).....	134
United States v. Lazarus, 425 F.2d 638 (9th Cir., 1970).....	135
United States v. McKenzie, 301 F.2d 880.....	106
United States v. Rocks, 339 F. Supp. 249, aff'd. 431 F.2d 1112 (4th Cir., 1973).....	61, 67
United States v. Wilson, 488 F.2d 1231 cert. granted, 5/13/74, Docket #73-1162 (2nd Cir., 1973).....	110, 113, 117

## TABLE OF CONTENTS

	PAGE
Preliminary statement-----	1
Questions Presented-----	1
Statement of Facts-----	3-9
The Evidence At The Trial - The Prosecution's Claim of Brasco's Knowing Involvement in a Criminal Conspiracy to Defraud the Government-----	9-17
The Prosecution's Presentation of an Alleged Agreement to Defraud Masiello-----	17-21
Brasco's Statement to the F.B.I.-----	21-22
The Credibility and Reliability of the Government's Evidence----	23-29
The Defense - Brasco's Character-----	30
The Testimony of Congressman Brasco-----	30-35
Other Defense Testimony-----	35-36
The Verdict-----	36
The Sentence-----	36-37
Post-Verdict Motion for a New Trial-----	37
POINT I - The Court Below Erred in Denying Rule 33 Relief. It Applied Erroneous and Irrelevant Legal Standards for Determining (a) Whether Reported Violations of Jury Seques- tration Created a Condition in Which Prejudice to Appellant Might Arise and (b) Whether Improper Exposure of Jurors to a Newspaper Article Directly Related to the Trial was Prejudicial. Additionally, the Court's Findings of Fact in the Second Respect are not Supported by the Record and are Clearly Erroneous-----	38-47
A. Proof of Repeated Violations of the Sequestration Order Wherein Jurors Separated and Were Exposed to Outside Contacts, Out of the Custody of Marshals, Without any Proof from the Government that the Jurors Were Not Subject to Contacts Which Might Have Swayed Them in Reaching a Verdict Mandates a New Trial. Alternatively, a Hearing Should be Held and the Government Required to Prove that the Separation Gave no Opportunity for the Exercise of Improper Influence-----	47-58

- B. The Trial Court Applied an Erroneous Legal Standard to Determine the Necessity for a New Trial Because of Improper Exposure of Sequestered Jurors to a Newspaper Article Directly Relating to the Trial. Moreover, Its Findings of Fact in This Respect are Clearly Erroneous. This Court Must Grant a New Trial on This Basis or Remand for a Proper Hearing----- 58-70

The Conceded Misconduct of the Marshals----- 70-71

POINT II - The Government's Case is Barred by the Statute of Limitations. Moreover, the Long Delay in Proceeding to an Indictment Prejudiced the Appellant and Denied Him Due Process of Law and a Fair Trial----- 72

- A. The Government's Case, As Clearly Revealed At Trial, Was Barred by the Statute of Limitations----- 72-89

- B. The Long Delay in Proceeding to an Indictment Prejudiced the Appellant so as to Deny Him Due Process of Law and a Fair Trial----- 90-95

POINT III - The Evidence Failed to Prove Appellant Frank J. Brasco Guilty of Criminal Conspiracy. The Case Against Him Was a Chimera----- 96-106

POINT IV - The Appellant Was Deprived of His Sixth Amendment Right To Confront His Accusers When a Principal Government Witness, Granted Full Immunity, Wilfully and Contumaciously Refused to Come Into Court and Testify From the Witness Stand and His Prior Testimony Was Read Into the Record, Over Defense Objection-----107

- A. The Tenth Circuit Cases Holding That the Contumacious Witness Renders Himself "Unavailable" by Reason of His Illegal Refusal To Testify are Pernicious and Should Not be Followed-----110-114

- B. Even if a Witness can Become Unavailable Because of a Wilful Refusal to Testify, Masiello Should not be Deemed Unavailable in this Case Since the Prosecution and Court did not use all Means at Their Disposal to Compel His Testimony-----114-121

POINT V - The Court Below Allowed the Prosecution to Present to the Jury Impermissible Inferences, Hearsay Declarations and Other Irrelevant but Prejudicial Material, so as to Deny the Appellant his Fifth Amendment Right Against Self-Incrimination, His Sixth Amendment Right of Confrontation, and his Right to a Fair and Impartial Trial-----122

	PAGE
Evidence Which Infringed on the Appellant's Rights Against Self-Incrimination Under the Guise of Showing Consciousness of Guilt-----	122-130
The Hearsay Declarations of Seth Brewer-----	130-131
Testimony of An Alleged Internal Agreement to Get a Finder's Fee From Masiello-----	131-132
Phone Calls to an Unidentified Weiner; The Letter Allegedly Written by Weiner's Finance Co. and Addressed to Brasco-----	132-133
Overall Prejudice-----	134
POINT VI - Appellant Was Deprived of a Fair Trial by the Politicalization and Sensationalization of the Trial Through Prejudicial References to the Mafia and Through Association with Controversial Political Figures-----	135-139
CONCLUSION-----	140

# TABLE OF AUTHORITIES

CASES	PAGE
A. B. Leach & Co. v. Peirson, 275 U.S. 120 (1927)-----	133
Adams v. Commonwealth, 221 S.W.2d 81 (C. of A. Ky. 1949)-----	48, 49, 54, 46
Armstrong v. State, 144 S.W. 195, (S. Ct. Ark. 1912)-----	50
Baker v. Hudspeth, 129 F.2d 783 (10th Cir., 1942)-----	48, 51, 52, 53
Barber v. Page, 390 U.S. 719 (1968)-----	111, 116, 130
Berger v. U.S., 225 U.S. 78 (1935)-----	139
Briggs v. U.S., 221 F2d 636 (6th Cir., 1955)-----	69, 70
Cavness v. U.S., 187 F2d 713 (5th Cir., 1951)-----	50
Chapman v. California, 386 U.S. 18 (1966)-----	129
Connedee v. U.S., 272 F2d 504 (D.C. Cir. 1959)-----	67, 70
Crawford v. United States, 375 F2d 332 (1967)-----	106
Deato v. Rodriguez, 477 F2d 1023 (10th Cir., 1973)-----	124
Edmonds v. U.S., 273 F2d 108 (D.C. Cir. 1959)-----	127
Garello v. State, 205 S.W. 179 (Texas 1892)-----	135
Gicinto v. U.S., 212 F2d 8 (3th Cir., 1954)-----	61
Gonzalez v. Beto, 405 U.S. 1052 (1972)-----	51, 57
Corum v. Craven, 465 F2d 443 (9th Cir., 1972)-----	116
Governor of Virgin Islands v. Aquino, 376 F2d 540 (3rd Cir., 1967)---	116
Griffin v. California, 380 U.S. 609-----	124, 130
Grunewald v. U.S., 353 U.S. 391 (1957)-----	72, 73, 95, 106, 127
Hall v. U.S., 419 F2d 582 (5th Cir., 1969)-----	139
Harris v. New York, 401 U.S. 222 (1971)-----	125

CASES	PAGE
Harrison v. U.S., 7 F2d 259 (2nd Cir., 1925)-----	106
Holman v. Washington, 364 F2d 618 (5th Cir., 1966)-----	116
In Re Murcheson, 349 U.S. 133, (1955)-----	138
Johnson v. Patterson, 475 F2d 1066 (10th Cir., 1973)-----	124, 125
Krulewitch v. U.S., 336 U.S. 440 (1949)-----	94, 95, 105, 106
Lee v. State, 258 S.W.2d 743 (Ct. Cr. Ap. Ala. 1972)-----	48, 49, 55
Mancusi v. Stubbs, 408 U.S. 204 (1972)-----	111
Marshall v. U.S., 360 U.S. 310 (1959)-----	59, 60, 61, 66, 67, 70
Mattox v. U.S., 146 U.S. 140 (1893)-----	59, 64, 70
Mattox v. U.S., 156 U.S. 237 (1895)-----	111
Miranda v. Arizona, 384 U.S. 436 (1965)-----	124, 125
Moran v. U.S., 399 F2d 93 (5th Cir., 1968)-----	64
Motes v. U.S., 158 U.S. 458 (1900)-----	112, 116, 121
Park v. Huff, 493 F2d 923, (5th Cir., 1974)-----	130
Parker v. Gladden, 385 U.S. 363 (1966)-----	51, 57, 59
People v. Ellis, 421 P.2d 393 (Cal. Sup. Ct. 1966)-----	125
People v. Leyra, 1 N.Y.2d 169-----	123
People v. Lovello, 1 N.Y.2d 436-----	139
People v. Maughs, 86 P 187 (S. Ct. Calif. 1906)-----	48, 49
People v. Nowakowski, 221 App. Div. 521 (4th Dept. 1927)-----	123
People v. Rutigliano, 261 N.Y. 103-----	124
People v. Sellinger, 265 N.Y. 149 (1934)-----	133
People v. Theisen, 199 N.W.2d 832 (Mich. Ct. App. 1972)-----	124

CASES	PAGE
People v. Thornton, 16 P. 244 (S. Ct. Calif. 1888)-----	49
Peterson v. U.S., 344 F2d 419 (5th Cir., 1965)-----	111
Pleau v. State, 38 N.W.2d 496 (Wisc. 1949)-----	116
Pointer v. Texas, 380 U.S. 400-----	130
Randen v. John R. Strachan, file number 68 Civil 4233, S.D.N.Y.-----	102
Remmer v. U.S., 350 U.S. 377 (1955)-----	59, 60, 61
Silverthorne v. U.S., 400 F2d 627 (9th Cir., 1968)-----	56
Smith v. U.S., 106 F2d 726 (4th Cir., 1939)-----	111
State v. Caine, 111 N.W. 443 (Sup. Ct. Iowa 1907)-----	67
State v. Duguay, 178 A2d 129 (S. Ct. ME. 1962)-----	50
Stone v. U.S., 385 F2d 713 (10th Cir., 1967)-----	62
Toussie v. U.S., 397 U.S. 112-----	93
Turner v. Louisiana, 379 U.S. 466 (1965)-----	57, 138
United States v. Adams, 385 F2d 548 (2nd Cir., 1967)-----	57
United States v. Alexander, 415 F2d 1352 (7th Cir., 1969)-----	62
United States v. Allsup, 485 F2d 287 (8th Cir., 1973)-----	109
United States v. Anderson, 498 F2d 1038 (D.C. Cir. 1974)-----	124
United States v. Archer, 486 F2d 670 (2nd Cir., 1973)-----	104, 105
United States v. Arnone, 363 F2d 385 (2nd Cir., 1961)-----	61
United States v. Baker, 442 F2d 1024 (2nd Cir., 1971)-----	67
United States v. Berger, 433 F2d 680 (2nd Cir., 1970)-----	56
United States v. Birnbaum, 337 F2d 490 (2nd Cir., 1964)-----	86, 88
United States v. Borelli, 336 F2d 376 (2nd Cir., 1964)-----	73, 83
United States v. Bractcher, 149 F2d 742 (4th Cir., 1945)-----	61
United States v. Bridges, 499 F2d 177 (7th Cir., 1974)-----	124

CASES	PAGE
United States v. Bruno, 105 F2d 921 (2nd Cir., 1939) rev'd. on other grounds 308 U.S. 287-----	132
United States v. Bryan, 223 U.S. 323 (1950)-----	115
United States v. Byrd, 352 F2d 570 (2nd Cir., 1965)-----	134
United States v. Casey, 428 F2d 229-----	106
United States v. Cashio, 420 F2d 1132 (5th Cir., 1970)-----	61
United States v. Crosby, 294 F2d 928 (2nd Cir., 1961)-----	59
United States v. Cunningham, 446 F2d 194 (2nd Cir., 1971)-----	109
United States v. Daly, 454 F2d 505 (1st Cir., 1972)-----	93
United States v. D'Andrea, 495 F2d 1170 (3rd Cir., 1974)-----	61
United States v. D'Antonio, 342 F2d 667 (7th Cir., 1965)-----	48, 49
United States v. Edwards, 463 F2d 1362 (5th Cir., 1972)-----	111, 116
United States v. Ewell, 383 U.S. 116-----	93
United States v. Falcone, 311 U.S. 205-----	132
United States v. Feinberg, 383 F2d 60 (1967)-----	94
United States v. Gersh, 328 F2d 460 (2nd Cir., 1964)-----	50, 58, 59
United States v. Giacalone, 477 F2d 1277 (6th Cir., 1973)-----	94
United States v. Gilbert, 25 F. Cases 1287 (No. 15, 205) C.C.D. Mass. 1834-----	51
United States v. Harris, 458 F2d 670 (5th Cir., 1972)-----	48
United States v. Hughes, 411 F2d 461 (2nd Cir., 1969)-----	111
United States v. Johnson, 371 F2d 800-----	106
United States v. Knuhl, 379 F2d 427 (2nd Cir., 1967)-----	134
United States v. Kum Sing Seo, 300 F2d 623 (3rd Cir., 1962)-----	67, 70
United States v. Lazarus, 425 F2d 638 (1970)-----	135
United States v. Levine, 288 F2d 272 (2nd Cir., 1961)-----	113

CASES	PAGE
United States v. Leviton, 193 F2d 848 (2nd Cir., 1951)-----	67
United States v. Marando, 73 -1908-----	119
United States v. Marion, 404 U.S. 307-----	93, 94
United States v. Marra, 482 F2d 1196 (2nd Cir., 1973)-----	117
United States v. James G. MARTIN, 74 Cr. 197-----	118
United States v. Masieffo, 69 Cr. 417, Docket #34769 rem'd. 434 F2d 33 (2nd Cir., 1970), aff'd. 445 F2d 1324 (2nd Cir., 1971)-----	74, 80
United States v. McKenzie, 391 F2d 880-----	100
United States v. McKinney, 429 F2d 1019 (5th Cir., 1970)-----	58, 69
United States v. Miller, 493 F2d 77 (2nd Cir., 1969)-----	59
United States v. Montgomery, 42 F2d 254 (S.D.N.Y. 1930)-----	61
United States v. Panczko, 353 F2d 676, (7th Cir., 1965)-----	49
United States v. Peoni, 100 F2d 401 (2nd Cir., 1938)-----	132
United States v. Petrone, 185 F2d 334, (2nd Cir., 1950)-----	62
United States v. Procaro, 356 F2d 614 (2nd Cir., 1966)-----	61
United States v. Puce, 476 F2d 1039 (2nd Cir., 1973)-----	130
United States v. Ramirez, 441 F2d 950 (5th Cir., 1971)-----	125
United States v. Rattenni, 480 F2d 195 (2nd Cir., 1973)-----	59, 60
United States v. Reina, 242 F2d 302 (2nd Cir., 1957)-----	75
aff'd.	
United States v. Rucks, 339 F. Supp. 249, 481 F2d 1112 (4th Cir., 1973)-----	61, 67
United States v. Russano, 257 F2d 712 (2nd Cir., 1958)-----	75
United States v. Satz, 109 F. Supp. 34 (D.C.N.Y. 1952)-----	93
United States v. Scully, 415 F2d 680 (2nd Cir., 1969)-----	93
United States v. Siebriht, 53 F2d 376, (2nd Cir., 1932)-----	74, 75, 89
United States v. Singleton, 460 F2d 1148 (2nd Cir., 1972)-----	112, 116

CASES	PAGE
United States v. Taylor, 464 F2d 240 (2nd Cir., 1972)-----	106
United States v. Wilshire Oil, 427 F2d 369 (10th Cir., 1970)-----	61
United States v. Wilson, 488 F2d 1231 cert. granted, 5/13/74, Docket #73-1162-----	110, 113, 117
United States ex rel Burt v. New Jersey, 475 F2d 234 (3rd Cir., 1973)-----	125
United States ex rel Macon v. Yeager, 476 F2d 613 (3rd Cir., 1973)--	125, 126
United States ex rel Owen v. McLann, 435 F2d 813, (2nd Cir., 1970)--	59
Williams v. Maryland, 375 F. Supp. 745 (D. Md. 1974)-----	116
Wilson v. Bowie, 408 F2d 1105 (9th Cir., 1969)-----	116
Yates v. United States, 355 U.S. 66 (1957)-----	113, 115

## CONSTITUTIONAL PROVISIONS

	PAGE
5th Amendment, U.S. Constitution-----	2, 62, 91, 94, 122
6th Amendment, U.S. Constitution-----	2, 94, 107, 122

## STATUTES AND RULES

18 U.S.C., Section 201-----	3
18 U.S.C., Section 203-----	3
18 U.S.C., Section 371-----	1
18 U.S.C., Section 1341-----	3
18 U.S.C., Section 4208 (a) (2)-----	108, 118
18 U.S.C., Rule 33, Federal Rules Criminal Procedure-----	1, 38, 39
New York Code of Criminal Procedure, Section 198, now repealed-----	123

## PROPOSED RULES

A.B.A. Standards Relating to Fair Trial and Free Press, Section 3.5 and Commentary-----	69
A.B.A. Standards - Trial by Jury, Section 5.7a, p. 172-----	59
Proposed Federal Rules of Evidence, Rule 804 (a) (2)-----	109

## STANDARD REFERENCE WORKS

5 A.L.R.2d 1411, Section 4-----	127
45 A.L.R.2d, at page 306-----	139
22 C.J.S., Criminal Law, Section 224, p. 575-----	13

	PAGE
23 A.C.J.S., Criminal Law, § 1356 p. 955-----	49
98 C.J.S., Sec. 434-----	124
Richardson, <u>Evidence</u> , 10th Ed., Sec. 167-----	123
Richardson, <u>Evidence</u> , 10th Ed., Sec. 214-----	127
2 Wigmore, <u>Evidence</u> , §§ 275, 278-----	64
2 Wigmore, Sec. 278 3rd Ed., p. 121-----	123
4 Wigmore, <u>Evidence</u> , § 1199 p. 460-----	64
5 Wigmore, <u>Evidence</u> , Sec. 1401, p. 147-----	111
5 Wigmore, <u>Evidence</u> , Sec. 1404-----	111

#### BOOKS AND LAW REVIEWS

Annual Report of the Attorney General (1925), pp. 5-6-----	106
34 Brooklyn Law Review 1, 1957-----	106
95 Harvard Law Review 1378 (1972)-----	130
Darrow, <u>The Story of My Life</u> , p. 64, 1934-----	106

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----x  
UNITED STATES OF AMERICA,

Appellee,

DOCKET NO. 74-2484

-against-

FRANK J. BRASCO,

Defendant-Appellant.  
-----x

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York, rendered on or about October 21, 1974 after trial by jury, convicting the appellant of a single count of conspiracy (18 U.S.C., Section 371) and sentencing him to a period of three months' incarceration, five years' probation, and a ten thousand dollar (\$10,000.) fine. (Hon. John M. Cannella at trial and sentence). The appellant is presently at liberty on his own recognizance pending appeal.

Questions Presented

1. Did the court below err in denying Rule 33 relief, and did it apply erroneous and irrelevant legal standards to

determine (a) whether reported violations of jury sequestration created a condition in which prejudice to appellant might arise and (b) whether improper exposure of jurors to a newspaper article directly related to the trial was prejudicial? Additionally, were the court's findings of fact in the second respect not supported by the record and clearly erroneous?

2. Was the government's case barred by the statute of limitations and even if not barred, did the long delay in proceeding to indict appellant so prejudice him as to deprive him of due process of law?

3. Did the government fail to prove that the appellant was guilty of a crime?

4. Was the appellant deprived of his sixth amendment right to confront his accusers when a principal government witness, granted full immunity, wilfully and contumaciously refused to come into court and testify from the witness stand and his prior testimony was read into the record, over defense objection?

5. Did the court below err in allowing the prosecution to present to the jury impermissible inferences, hearsay declarations and other irrelevant but prejudicial material, so as to deny appellant his fifth amendment right against self-incrimination, his sixth amendment right to confrontation, and his right to a fair trial?

6. Was appellant deprived of a fair trial by the politicalization and sensationalization of the trial through irrelevant and prejudicial references to the Mafia and to political associations?

### Statement of Facts

The appellant, Frank J. Brasco, an attorney and New York City Congressman for eight years until his career was ended by this conviction, was charged along with his uncle, Joseph Brasco, in an indictment dated October 23, 1973, with conspiracy to violate Section 201, 203 and 1341 of Title 18, U.S.C., to wit: bribery of a public official, conflict of interest, and mail fraud. Named as co-conspirators but not defendants were one Joseph Doherty former Post Office official, and John A. Masiello, controlling figure in several trucking companies which had done business with the United States Post Office. The indictment in essence alleged that between June 2, 1967 and January 4, 1969, the defendant, Frank J. Brasco, by virtue of his public office, conspired in the Southern District of New York and in the District of Columbia to obtain and retain truck leases from the Post Office Department for firms controlled by John Masiello through unlawful and fraudulent means.

After a first trial had resulted in a hung jury, a second jury returned a verdict of guilty on July 19, 1974, after several hours of deliberation. A review of the evidence and allegations in the case at bar reveals that there are many items which are undisputed and uncontradicted. First, there is no claim that Frank Brasco gave or received any money or that he in any way received personal benefit or enrichment. No evidence whatever was presented that acts performed by the appellant were outside the scope of his legitimate and regular duties as a

congressman, nor was there any proof that the decisions of the Post Office Department were in any way improperly made as a result of the congressman's actions. There is also no direct testimony or evidence from a disinterested or impartial source providing personal first-hand proof of any illegal activity or transgression by the appellant. Rather, the prosecution's entire case rested upon the testimony of three named co-conspirators, one of whom actually refused to testify in the second trial, another of whom sought to avoid testifying at the second trial, and all of whom had histories of prior criminal activity and had established reputations as liars and manipulators. It is also undisputed that government investigators from the United States Attorney's office in Maryland and the Justice Department's Strike Force Against Organized Crime under Henry Peterson, had spoken to Doherty and Weiner, two of the alleged co-conspirators in 1969 and 1970, and had taken a statement from Congressman Brasco regarding his knowledge of the events in December of 1970. Following full investigations by these governmental agencies in 1969, 1970, and 1971, no governmental action was taken nor was any claim of improper conduct on Congressman Brasco's part alleged until the sudden resurrection of the case by Edward Shaw, the prosecutor in the United States Attorney's office for the Southern District of New York, some three years later. The indictment filed on October 23, 1973, came down just two months prior to the five-year time limit on the last overt act alleged in the indictment, and in fact, during the trial overt act Number 16, which alleged activities

from November 18, 1968 to January 4, 1969, was withdrawn by the prosecution when it became clear that there was absolutely no basis for its inclusion. The indictment was thus in effect rushed through in an effort to escape the statute of limitations. (It is appellant's contention as outlined in Point II, that the statute has in fact run on the charge.) The catalyst for the obtaining of the October 23rd indictment appears to have been conversations had between the prosecutor, Mr. Shaw, and John A. Masiello, long-time criminal and reputed member of organized crime, who contacted Mr. Shaw in an effort to alleviate his situation when he found himself facing seven years in aggregate prison terms. It is undisputed that discussions were had between Shaw and Masiello regarding relocation and earlier release from prison and that Masiello, during the course of his "cooperation," was allowed trips home and visits to his mistress, as well as a trip to Florida. A letter explaining Masiello's cooperation had also been sent by Mr. Shaw to the Parole Board (T 1603, 1604, 1619, 1623, 1624, 1639, 1640, 1835). \*/

It is also undisputed that due to the long passage of time with regard to the incidents alleged, memories had failed and relevant documents had been lost or destroyed, and important witnesses had died.

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\*/ T - Refers to Minutes of Trial.

Further, it is clear that in preparing his case the prosecutor showed numerous documents to prosecution witnesses in an effort to get them to recall dates and meetings and that the prosecutor often told witnesses about the testimony of other witnesses. In fact, joint meetings were held on occasion with several of the witnesses where they discussed their testimony. Many of the prosecution witnesses admitted during the trial that they had no independent recollection of events and dates that they were testifying to and that their "recollection had been refreshed" only after interviews and conferences with the prosecution (T 367, 370, 384, 392, 408, 479, 487, 489, 490, 500, 508, 516, 523, 548, 565, 583, 1420, 1423, 1448, 1656, 1661, 1825, 2987).

One prosecution witness in fact changed portions of his testimony at the second trial from what he had stated at the first trial, indicating that "when Mr. Shaw had me in his office prior to my testifying in February he had kept on mentioning Brasco's name time and time again and after a while I started to see Brasco's name in that plate on the door" (T 894).

It was also established during the trial that witnesses had been specifically instructed by the prosecution not to mention certain testimony (T 1416, 1485, 1573, 1575).

It was further undisputed that John Masiello, a named co-conspirator and a person with a long criminal history as well as reputed connections with organized crime, had been dealing with the United States Post Office since 1959. For six years he had

been dealing with that agency with regard to leasing trucks to the post office for the delivery of mail through Atlantic Coast Truck Leasing Company and East Coast Corporation, firms which he owned and where he was listed as the legal owner. Following financial difficulties experienced by those firms, he began in 1965 to deal with the Post Office through A.N.R. Truck Leasing Corp., a Bronx-based firm controlled by him through his son, John, Jr., who was listed as President, but where his name did not appear in the corporate records as an officer (T 1105, 1106, 1110, 1261-1265). Masiello testified that from 1959 to 1967 he had good relations with the Post Office Department and his trucks operated on a regular basis out of the 34th Street garage in New York City. Masiello knew and saw on a weekly basis both Andrew Daly and Isadore Kihl, local Post Office officials in the New York City branch (T 1111, 1267). During 1967-1966, A.N.R. Leasing also applied for and received loans from the Small Business Administration totalling \$560,000., (T 1613) which loans were not called in by the government until 1969 (T 1815), although the SBA in 1966 was aware of Masiello's criminal background (T 2333-2336, 2897).

In April of 1967, the Post Office offered public bidding for contracts for the leasing of trucks to service the Long Island area. Masiello, through A.N.R. Truck Leasing Corp., entered a bid for these contracts. In June of 1967, he learned that his firm had been outbid and feeling that E.G. Maintenance, the company who had been awarded the contract, was not qualified to

perform the work he lodged a complaint with Congressman Frank Brasco, the only New York City member of the House Post Office Committee who took office effective January, 1967 (T 150, 1135, 1678, 2224-2227). After inquiries through the Congressman's office, it was learned that Post Office officials had determined that for legal reasons the May 1967 bids would be rejected and the contracts readvertised for public bidding in October of 1967 (T 2033). Through the rebidding process, A.N.R. Truck Leasing was eventually awarded the contract on January 15, 1968 (T 170, 180, 200). Thereafter, A.N.R. continued to supply the Post Office with trucks until June 30, 1968, when its contract with the Post Office expired. (T 626, GX 47D).

The Post Office, in May of 1968, refused to renew A.N.R.'s contract when a magazine article indicated that Masiello and Thomas McKeever, an official of A.N.R., had long criminal backgrounds and were alleged to be connected with organized crime (T 624-626, 2245). The F.B.I., in 1966, had visited the department and more particularly Thomas Cahill, Chief of Supply and Procurement in the New York region, and a report about Masiello was forwarded to the Washington office, but no action had been taken at that time (T 2893-2897). (This was before Frank Brasco became a congressman). After the expiration of A.N.R.'s contract, Masiello, on June 24, 1968, again bid for Post Office contracts, utilizing another of his corporations, Randen Trucking Corp. Being the low bidder, he supplied trucks until October 1968 when the arrangement was terminated by the Post Office when it learned

of Masiello's connection with that corporation (T 638, 1229, 1238). Masiello testified that despite his October 1968 cancellation, however the Post Office continued to use his trucks on a per diem emergency basis and the government exhibits themselves reveal the government's desire to continue to use Massiello's trucks (GX 24). He also supplied trucks to Bermur Leasing Corp., the new post office contract holder, which, in turn, were leased to the Post Office (T 1761, 1309).

#### THE EVIDENCE AT THE TRIAL

#### THE PROSECUTION'S CLAIM OF BRASCO'S KNOWING INVOLVEMENT IN A CRIMINAL CONSPIRACY TO DEFRAUD THE GOVERNMENT.

The prosecution's theory that Congressman Brasco's action on behalf of A.N.R. Truck Leasing was not a routine inquiry for an aggrieved member of the business community but was a purposeful and knowing involvement in a conspiracy to defraud the government for personal gain, rested largely on the testimony of three admitted criminals. Joseph Doherty, a former Post Office official, who had been indicted for two counts of bribery and for defrauding the government with regard to another matter, had agreed to testify in the Brasco case in return for being allowed to enter a nolo contendere plea, which resulted in his receiving a fine and a term of probation in the other case. In addition, he had obtained immunity from the government with regard to his activities in the instant case and had been named in the indictment merely as a co-conspirator but not a defendant (T 85-94).

Doherty testified that he had served as an Executive Assistant in the Bureau of Postal Facilities in the Washington office of the Post Office, and in 1967 one of his responsibilities was to act as a liason with members of Congress (T 115). Through his position he had come to meet and know Congressman Brasco who was the only New York City member of the House Post Office Committee (T 117). Doherty stated that in June of 1967 he had been requested by Michael Sullivan, another Post Office official who had died in 1973 (T 119) to accompany him to the office of Congressman Brasco because a trucking contractor was having a problem with the New York Post Office. At a meeting in the Congressman's Washington, D.C. office, he and Sullivan met John Masiello, and another gentleman whom he believed to be Masiello, Jr. Masiello explained to them that he had been outbid regarding a leasing contract and he believed that the low bidder, E. G. Maintenance, was not qualified because it didn't have the proper equipment (T 134-137). Doherty stated that the meeting lasted about one-half hour to forty-five minutes and that he made notes on a memo pad from Brasco's office (T 129, 136). Doherty further stated that after Masiello left, Brasco told Sullivan and Doherty that he would like it if anything could be done to help Masiello. Doherty indicated he would check on the situation and get back to the Congressman (T 137). Doherty stated that Sullivan had also told him that he had gone to New York to talk to Joseph Brasco, the Congressman's uncle, regarding the matter (T 138). Doherty testified that initial inquiries

into the matter indicated that E. G. Maintenance was qualified and nothing could be done. After reporting that to Congressman Brasco, he was asked to try again and after speaking to Seth Brewer, another Post Office official, he learned that a legal opinion had been obtained declaring the previous bidding procedure invalid and allowing all bidders to resubmit new bids (T 150-158, 160, 170). In his dealings with Brewer and the legal staff, no one suggested to them what decision to reach nor was any money given to them (T 417, 422). Doherty then testified that Sullivan told him that Brasco wanted them to help A.N.R. get the award of the contract on the new bidding (T 171). Shortly thereafter Doherty stated that Masiello contacted him and informed him he was going to bid \$40.-\$42. per day per truck. Doherty informed him that that figure would be too high and he would lose the bid. Doherty stated that he later informed Brasco of Masiello's intention and the Congressman asked him to come to New York to talk to Masiello (T 172-174). According to Doherty, he met Masiello and Brasco, and he believed Thomas McKeever, an A.N.R. official, in the Congressman's New York office on a Saturday in September of 1967, where he told Masiello to reduce his bid and that once he had his contract, they would help him get additional aid from the government (T 174-176). Following the meeting, Masiello took Doherty to the airport. Doherty stated that he spoke to Masiello again in October of 1967 and advised him to bid \$32.-\$33. When the bids were opened later in that month, A.N.R. came out the highest of the three bidders with

E.G. Maintenance (Lehigh) and Range Rental Companies ahead of them. Doherty testified that based upon claims from Masiello that E.G. was not qualified for the contract (a fact which was later verified by their failure to get a Small Business Administration Certificate of Competence), and the fact that Range only had 5 trucks, the Post Office contract was subsequently awarded to A.N.R. on January 15, 1968 (T 186, 198, 200).

Doherty stated that during the year 1967 both he and Sullivan were in financial debt as a result of political activities in which they had both engaged and Sullivan had suggested that maybe they could get the money from "Uncle Joe." A few days later he received \$2,000. in cash in an envelope from Sullivan in Washington, D.C., and Sullivan told him this is from 'Uncle Joe.'

Doherty stated he didn't know whether the money was a loan and he didn't expect to get any more money (T 202-204, 466, 475). Doherty also testified that he believed, when he got the money, that it came from Masiello (T 465). Doherty also testified that in the fall of 1967 he had learned from other officials in the Post Office that Masiello and his son had Mafia connections and he relayed this information to Congressman Brasco. According to Doherty, Brasco informed him that those were old stories which had never been proved (T 202). Soon after Masiello obtained the Post Office contract he contacted Doherty telling him he was losing money and needed assistance. Masiello made several calls along these lines and in March of 1968 Doherty met with Brasco

and Masiello in the Congressman's Brooklyn home. Doherty told Masiello that his losses would have to be documented before they could be able to help him. Doherty stated that from January to June of 1968 he spoke to Brasco an average of once a day and saw him some twelve times regarding this and other matters. Doherty stated that in March or April of 1968 he learned that the Post Office was investigating Masiello and he informed Brasco that it was getting risky to keep pushing Masiello. According to Doherty, Brasco told him it was old stuff and not to worry (T 265-267). On May 27, 1968, however, he learned that the Post Office had decided to terminate A.N.R.'s relationship with the agency because of Masiello's background and the following day he met with Brasco in the Congressman's office regarding the matter (T 289). During the discussion the possibility of transferring the contract to an independent company was discussed (T 291-293). Thereafter, Brasco spoke to Timothy May, counsel to the Post Office, Douglas Nobles, executive assistant to the Postmaster General and Howard Cook, a congressional liaison officer regarding the decision to terminate the A.N.R. contract. Their testimony is summarized in Point II as is the testimony of Weiner and Doherty concerning their conversations with Brasco after May 31, 1968.

John Masiello, the prime figure in the alleged conspiracy, refused to testify at the trial, but his testimony from a previous trial which had resulted in a hung jury was allowed to be read to the jury over defense objection (T 1098). Masiello had previously been convicted of smuggling, bribing Post Office officials, Income Tax evasion, bribing an internal revenue agent,

extortion, and lying to a draft board regarding his son. He was in the process of serving sentences totalling seven years in federal prison and he was under indictment for commercial bankruptcy fraud (T 1098-1102). He had been granted immunity for his activities in the case at bar and the witness acknowledged that visits to his wife and his mistress had been arranged by the United States Attorney's office during his "cooperation" in this case and a letter had in fact been sent to the Parole Board by Mr. Shaw, the prosecutor in the case (T 1103, 1602-1603, 1624, 1637-39, 1860). Masiello, while incarcerated in a federal prison had written to the United States Attorney's office seeking to get some help for himself. He had discussed with the prosecutor the possibility of helping the prosecutor in return for being re-located and in obtaining an earlier release from prison (T 1622, 1639-1641). Masiello had refused to talk to the government regarding cases involving organized crime and only agreed to testify against Congressman Brasco (T 1649, 1854).

Masiello testified that in June of 1967 he was upset over the loss of a bid for post office contracts. After learning that nothing could be done through the 34th Street Post Office in Manhattan, where he had extensive contacts, Masiello discussed the matter with Ralph Ferraro, a fellow trucker, who was now dead (T 1127-1129, 1119). Ferraro had suggested speaking to Joseph Brasco whose nephew was a congressman. At a meeting in June of 1967, Joe Brasco stated he would make an appointment for Masiello to see his nephew and the three men also discussed the possibility of a partnership if the contract could be obtained

(T 1130, 1134, 1676). Later that month he flew to Washington, D.C. accompanied by Peter Ferraro, Ralph's son, to Brasco's congressional office (T 1137). Peter Ferraro in his testimony before the jury was unable to state that he had been to Congressman Brasco's office, although he recalled flying to Washington, D.C. with Masiello (T 879, 890, 914). Masiello testified that he explained to Congressman Brasco that he had worked for the Post Office for several years and had given them good service and that the low bidder for the contracts did not have proper equipment. Brasco then referred him to Doherty and Sullivan who entered the office and he discussed the situation with them while the Congressman left the office to attend to other matters (T 1137-1142, 1663, 1678). Masiello explained his problem to them and was informed they would check it out (T 1142). Masiello stated that that was the first time he had met Congressman Brasco and he had never told him he was involved in organized crime, but had instead let him know he was a substantial businessman (T 1139, 1663, 1707, 1871). Masiello then thanked Brasco for his help and returned to New York accompanied by Peter Ferraro. In August of 1967 Masiello stated that he learned the original bids had been invalidated and in late August or October of 1967, he claimed that he and McKeever, the Secretary-Treasurer of A.N.R., met with Brasco and Doherty at the Congressman's Brooklyn office (T 1107, 1146, 1147). At that meeting Doherty gave him information on what to bid in order to get the contract. A bid of \$33. a day was discussed and Doherty told him that once he got the contract he might get extra money for mileage and fuel (T 1148). According to Masiello, Brasco was only present during the conversation for part of the time (T 1149).

On the way back to the airport, Masiello stated that in a very light manner Doherty made a reference to political contributions (T 1150). After the October 1967 meeting Masiello testified that he again discussed a partnership arrangement with Ralph Ferraro and Joe Brasco but when Masiello indicated he needed \$50,000. from each of the other two for the enterprise Joe Brasco stated it was too much and all further discussion on the issue stopped (T 1159). Following the October 1967 bids Masiello learned that E.G. Maintenance (Lehigh) had still come in lower than his company in the bidding so he informed Doherty as to the inability of this other firm to perform. In January of 1968 he learned that A.N.R. had been awarded the contract but within a few weeks of operation he was losing money on the deal. He informed Doherty of his problem and he met with Doherty and Brasco at the Congressman's home in April of 1968 (T 1184-1185, 1695). Doherty informed him to get a statement regarding mileage and gas consumption and to send it to the 34th Street Post Office Branch in New York to forward this information to the Post Office (T 1188). (Harry Salvan, Masiello's attorney, testified that he sent letters regarding this matter to the post office (T 696)). Masiello also testified that he met Joe Brasco and Ralph Ferraro in a restaurant in May of 1968 and that Joe Brasco informed him that "something had to be sent below." Ferraro indicating a figure of \$10,000. Later that month at the same restaurant Masiello gave Ferraro \$10,000. in an envelope which was turned over to Joe Brasco (T 1205, 1287). On May 31, 1968 Masiello stated he learned his contract had been

cancelled when two postal inspectors delivered a letter to his office.

Masiello further stated that after May 31, 1968 he never spoke to Frank Brasco again and that even from the period of January to May 31, 1968 he had spoken to him only two or three times (T 1244). Masiello stated that he never arranged for any money to go to Frank Brasco and that he never complained to the Congressman that he gave anyone \$10,000. (T 1726, 1738). After June 1968 he did not see or speak to either Doherty or Weiner, nor did he receive any additional compensation for mileage or fuel from the government (T 1234, 1235, 1727). Masiello's testimony as to his own activities after May 31, 1968 is summarized in Point II

THE PROSECUTION'S PRESENTATION OF  
AN ALLEGED AGREEMENT TO DEFRAUD  
MASIELLO.

According to the prosecution, during 1967-1968 A.N.R. Truck Leasing Corp. was experiencing severe financial problems and in March of 1968 Masiello spoke to Doherty regarding a loan in the area of one million dollars for his corporations (T 1715-1717). Doherty referred Masiello to Joseph Weiner, an alleged mortgage banker whom Doherty had met in December of 1967. Doherty had in turn introduced Weiner to Congressman Brasco in January of 1968 (T 218-220, 1167-1169, 1322-1326). A meeting was arranged in March of 1968 in Brasco's Washington office and, according to Weiner, Brasco informed him that his client A.N.R. was under pressure to pay back some one million dollars in cash

which Masiello had previously borrowed for equipment from the Mafia, (T 1406). During the meeting Weiner stated that Doherty took him aside and told him of Masiello's criminal background (T 226, 1328-1331). At a subsequent meeting between Brasco, Doherty and Weiner it was alleged that an agreement had been reached to charge a fee of 1% for the loan and that one-half of the fee would go to Brasco with one-fourth to go to Doherty indirectly through another post office official named Carter and one-fourth to go to Weiner (T 226-231, 1327). It was subsequently decided that Brasco's share would be paid in cash to Joe Brasco to be used to defray campaign expenses of the Congressman (T 269, 1334). According to Weiner and Doherty, Brasco instructed them that Masiello was not to know of his receipt of a portion of the fee (T 260, 1343-44). In the ensuing weeks financial statements regarding A.N.R. were delivered by Thomas McKeever to Doherty and on April 8, 1974 a meeting attended by Masiello, Doherty, Weiner and Frank Brasco was alleged to have been held at Congressman Brasco's law office at 170 Broadway, in New York (T 238, 1169, 1332, 243, 252-255, 1335).

According to Weiner he observed Masiello's bodyguard drop a gun to the floor during the meeting, stating that he mentioned this fact only on cross-examination at the first trial, after having been told by the prosecutor, Mr. Shaw, not to mention it on direct (T 1415, 1416, 1340). Weiner further testified that he had contacted several companies regarding Masiello's loan, giving the name of one as Finance Company of America where he spoke

to a Mr. Fitzell (T 1507). (Fitzell is deceased). At the April meeting he informed Masiello that he had two or three sources of money available but could only arrange for a \$900,000. loan and requested additional financial documentation from the company which Masiello subsequently had his accountant Harold Schore provide (T 258, 1353, 1020-1023).

During April of 1968 Brasco, according to Doherty, had difficulty in reaching Weiner regarding the progress of the loan and he told Doherty not to fool around because Masiello's people were rough guys (T 242, 264). In April and May, Brasco requested Doherty and Weiner to see Meade Esposito, a Brooklyn political leader and an officer in the Kings County Lafayette Trust Company Bank, regarding possible loans for future activities. According to Doherty, Brasco told him not to mention Masiello's name in dealing with Esposito, although Doherty acknowledged that he never mentioned this in his earlier testimony to Federal officials in 1969 (T 322, 323). Doherty stated that he and Weiner did meet with Esposito during May of 1968 (T 277-280, 1363).

Toward the end of April of 1968 Weiner forwarded to A.N.R. a telegram indicating that Washington Finance and Investment Corp. was prepared to offer a \$875,000. loan (T 118, 263, 1348, GX 5). Weiner indicated to Doherty and Masiello however that a finder's fee, somewhere around \$35,000. would be required (T 263, 1431, 1725). Weiner stated that he was unable to obtain final action on the loan, however, because he required a letter from the Post Office indicating that they would renew A.N.R.'s contract.

After requesting this documentation from Doherty, it was forwarded on May 24, 1968. Doherty stated that he arranged to have the letter of intent forwarded after speaking to Brasco and Seth Brewer (T 285, 1367). Amos Coffman, Deputy Assistant Postmaster General during 1968, stated that he received a call from Doherty on May 24th requesting the renewal letter and he had the letter sent out after checking with the New York office (T 2995). Shortly thereafter Weiner learned that Masiello's A.N.R. contract with the Post Office had been terminated and he telephoned Brasco regarding the matter. According to Weiner, Frank Brasco told him not to be concerned, that he and Doherty would try to ~~get~~ the award through another company (T 1369-70). Weiner eventually informed Brasco that the only way to get a loan would be on the value of collateral, without regard to any contract (T 1373-74). The Congressman later informed him that that was not acceptable (T 1370-1372). Weiner stated that toward the end of June he had John Russo of Washington Finance Company send a letter to Brasco regarding the status of the loan and in July of 1968, all further action on a loan for Masiello was halted and a letter that the file was being closed was forwarded from Washington Finance Company to Doherty (T 1558, see GXs 51 and 52).

Daniel Himmel, Brasco's law partner in 1968, testified that he met John Masiello in early 1968 after Brasco told him to call. Himmel stated that he discussed with Masiello the problem of obtaining an increased loan for A.N.R. from Royal National Bank and that he asked Masiello for a \$500. fee and the

necessary financial documents, but that he never got either (T 950-955). Himmel stated that he never heard anything regarding a loan from Weiner and he acknowledged being under suspension as an attorney for taking out escrow money that was held by the firm (T 960, 968).

BRASCO'S STATEMENT TO  
THE F.B.I.

Louis Hutchinson, former F.B.I. agent testified that on December 8, 1970 in the company of Agent Broden, he visited Congressman Brasco at his Washington office regarding the Masiello matter. At that time Brasco had indicated that he knew Joseph Doherty but was unfamiliar with Weiner. \*/ The Congressman had stated that he would rather speak to U.S. Attorney Beall in Maryland or his assistant who was handling the case. Brasco was advised of his constitutional rights and the agents returned on December 15, 1970 (T 744-749). At that time the matter was again discussed and a statement was prepared for his signature. The Congressman refused to be placed under oath stating that his answers were to the best of his recollection. Brasco made handwritten corrections on the statement and it was returned on December 18, 1970 in retyped form (T 756-759, GXs 56,57).

According to Hutchinson Brasco had told him that Masiello had contacted him regarding a problem with the Post Office and he

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\*/ However, during an F.B.I. interview, Brasco did recognize Weiner as the fat man.

further showed them a fact sheet about Masiello's loans from the Small Business Administration. Brasco stated to them that he couldn't understand how the Post Office could continue to do business with A.N.R. if the Small Business Administration knew as early as November of 1966 of the unsavory backgrounds of individuals connected with the company (T 797-804, 811). The Congressman also informed the agents that they were free to discuss the matter further with his staff. Hutchinson stated however that no further inquiries were made (T 822).

In the statement signed by Congressman Brasco he acknowledged meeting with Masiello in his Brooklyn office on a Saturday some time in 1968 and that Masiello had made a complaint against the Post Office with whom he had dealt for twelve years. He had never met Masiello before and did not know anything about him. The complaint was referred to his Administrative Assistant Frank Kilroy and subsequently Joseph Doherty of the Post Office became involved, and Doherty informed him that a complaint regarding the matter was already on file. Brasco stated that he had no recollection of any meeting in Washington, D.C. or in New York City involving Doherty and Weiner and he had no knowledge of any efforts by Weiner to arrange for a loan to A.N.R. He denied having any discussions regarding a fee arrangement for the loan or of any other activities on behalf of A.N.R. except to make inquiry regarding the initial complaint. When he learned of Masiello's background from Tim May, he instructed his staff to take a hands off attitude regarding A.N.R. and he denied ever receiving any fees as political contributions from A.N.R. (See GX 57).

THE CREDIBILITY AND RELIABILITY  
OF THE GOVERNMENT'S EVIDENCE.

Joseph Doherty, Joseph Weiner and John Masiello:  
The Men and Their Testimony.

Joseph Doherty during his tenure at the Post Office had been involved in numerous schemes along with Joe Weiner to obtain personal gain at the expense of his public office. Kenneth Gray, Congressman from Illinois and Chairman of the Capitol Police Committee, testified that he had known Doherty for twenty years and his reputation for truthfulness was very bad (T 2347). Lucy Sullivan, wife of Michael Sullivan, characterized Doherty as having a reputation for being a liar (T 1909). John Rademacher, President of a Postal Workers Union also stated that although he was a good friend of Doherty's father, who had helped him obtain his present position, Doherty himself was dishonest and had a reputation for being disreputable (T 2166, 2167). In April of 1969, Doherty had learned he had been indicted by the Baltimore U.S. Attorney in a 9 count indictment for a scheme involving kick-backs for the awarding of Post Office contracts to a private builder. He was first questioned by the Baltimore U.S. Attorney's office in October of 1970 when he was afraid of being convicted. He also felt that Weiner was testifying against him regarding the Baltimore indictment (T 323, 340, 345, 350, 351, 426). In his conversation with the U.S. Attorney he was told that they wanted him to implicate a Congressman and he was given the names of several, including Congressman Brasco (T 345). After discussions

with the U.S. Attorney he agreed to "cooperate" in return for a nolo plea and a sentence of probation.

Joseph Weiner in 1968 had advertised himself as a commercial financier. During that time he had been in continual contact with Doherty and they had numerous business dealings together. Weiner had been convicted at the age of 20 years old of committing some 16 separate burglaries involving fraternity houses while at college and had pleaded to a 16 count indictment involving various counts of theft and larceny (T 1318, 1385-1390). One of the thefts involved a \$2500. diamond ring taken from the mother of a fraternity brother (T 1483, 1484). He had received a sentence of probation and had been required to make restitution of the items taken as well as to undergo psychiatric treatment. Weiner also acknowledged that he had throughout the years given false statements regarding applicants for professional licenses and that he was a potential defendant in 1969 regarding an FIA loan scandal. He had arranged for immunity in that case in return for talking about Doherty's involvement with him and he had again arranged for immunity in the Brasco case. Weiner acknowledged that he was involved with Doherty in the attempts to obtain a bribe from a builder doing work for the post office, a bribe of \$80,000. (T 1319, 1321, 1393, 1396-1401, 1520). \*/

John Masiello, who had testified at Brasco's first trial, refused to testify during the second trial. After numerous conferences on this issue, Judge Cannella, over defense objections, permitted the reading of Masiello's testimony at the first trial.

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\*/ It seems apparent that the trial prosecutor himself had misgivings as to the truthfulness of Weiner's testimony, particularly on the subject of the alleged payment of money (T 1571).

John Masiello had an extensive criminal background with convictions for bribery, extortion and fraud (T 1078-1102). His testimony in the first trial had produced a quid pro quo from the government in terms of visits to his wife and to his mistress and letters on his behalf to the Parole Board which Masiello stated he hoped would reduce his jail term (T 1861, 1862).<sup>\*/</sup> After having refused to cooperate with the authorities in a variety of cases, Masiello wrote to Edward Shaw, Assistant United States Attorney for the Southern District in March of 1973 upon his incarceration in a federal prison. Although acknowledging that he had refused and still refused to testify regarding other cases, he had nonetheless agreed to testify against Congressman Brasco. Masiello also acknowledged that he had lied in the past for his own advantage even while being under oath in a divorce action against his wife as well as in a bankruptcy action (T 1103, 1602-1603, 1637, 1824, 1834).

With respect to the Brasco matter, Doherty acknowledged that he initially attempted to conceal his involvement and had once told an agent that Tim May had helped get A.N.R. the contract (T 550). He also acknowledged that the first time he mentioned any plot to get Masiello's bid into the post office after A.N.R.'s cancellation, was in 1973 when he spoke to Shaw (T 565). Doherty also testified that he was in heavy debt because of his political activities and he acknowledged that in 1968 he was active in Senator Humphrey's presidential campaign and may have requested Brasco to introduce him to Meade Esposito for the purpose of

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<sup>\*/</sup> In a "Dear Mike" letter from Masiello to the assistant U.S. Attorney, Masiello also solicited help for his son, then also serving time (T 1881; Def's. X BC).

discussing the campaign (T 319, 473). When he met Esposito in May of 1968 he admitted that the Humphrey campaign was discussed. He further stated during cross-examination that when he first spoke to the U.S. Attorney's office about the Masiello case, he never told them that Brasco had informed him not to mention Masiello's name to Esposito (T 322). Doherty also stated that he saw Brasco on numerous occasions regarding post office business and political matters. Doherty further stated that he did not have any independent recollection of where he was on April 8, 1974 -- the date he later swore he and Masiello met with Brasco -- and had been shown lists of phone calls by the prosecution in an effort to have him recall the date. He further acknowledged that his diary indicated a meeting with Brasco on April 11, 1974 but he now recalled he was in Georgia on that date (T 490, 507), (Government's Exhibit 37A). Although Doherty stated he had gotten no voucher for reimbursement when travelling to New York to see Brasco, he stated that he did keep a voucher for a 50¢ taxi trip when he visited Esposito on behalf of Humphrey (T 481, 278, GX 41-A).

Both Weiner and Doherty also admitted that the commitment letter sent to A.N.R. by Washington Finance Corp. was a phony and that in fact Washington Finance was a "Shell" company controlled by Weiner (T 453, 1436). During cross-examination of Weiner, it was established that Washington Finance had operated out of a \$75. a month room subleased from a janitorial service and at best had only two temporary part time employees. Weiner also acknowledged that he had previously testified in a bank-

ruptcy action that the company had ceased doing business in February of 1968 (T 1440-1444). It was also revealed on cross that the Mr. Fitzell of the Finance Company of America, who Weiner stated he had contacted in 1968 regarding A.N.R.'s loan, had died before the trial. In addition, Weiner had not even mentioned him during his testimony at the first trial (T 1507).

Doherty also stated that he and Weiner broke off dealings in July of 1968 following a fight in which Weiner threw a bottle at him (T 577). Doherty testified that he told the U.S. Attorney in 1969 that Weiner was a loanshark and Weiner stated that Doherty attempted to obtain bribes from contractors for favors he didn't even do (T 461, 1397).

During cross-examination Masiello stated that he never told Joe Brasco about his application for additional funds for mileage and fuel and that whenever he had a problem or question, he would call Joe Doherty (T 1634-1636). Masiello also stated that he did not recall the dates of any of the incidents he related until Mr. Shaw, the prosecutor, showed him documents (T 1656) and that he wasn't sure of which time of year he had been talking about or even what years (T 1657). Masiello also related that he had spoken to Shaw only after Ralph Ferraro had died (T 1670). Masiello also acknowledged that if A.N.R. had accepted the \$875,000. loan Weiner offered, A.N.R. would have had to pay \$25,000. a month at a time when his firm was in severe financial difficulty. During cross-examination, it was revealed that A.N.R.'s financial problems were related to Masiello's withdrawal of corpora-

tion funds for personal activities and for various loansharking ventures (T 1711-1715). Masiello also stated that it was possible Joe Brasco told him he could not go into partnership with him because his nephew was a congressman (T 1739) and he also acknowledged that when he called Joe Brasco a few days after the cancellation of his A.N.R. contract, Joe Brasco didn't know anything about it (T 1759).

With respect to the various meetings alleged to have been held by the three men with Congressman Brasco, it was established through Masiello's testimony that at the alleged June 1967 meeting in Brasco's Washington congressional office he discussed the question of E.G. Maintenance's lack of proper equipment in order to have that company disqualified as low bidder. It was established during the trial that with respect to the initial bids held in May of 1967 that A.N.R. was the seventh lowest bidder and that six others including E.G. had given lower bids thereby making it impossible for A.N.R. to get the contract even though E.G. was disqualified. It was in fact the October 1967 bids in which A.N.R. had the chance to obtain the contract by knocking out E.G. Maintenance (T 134-137, 1137-1142, GX 29). Doherty also admitted during cross that he told the U.S. Attorney in Maryland that he first met Masiello in October of 1967 and that only after having been prepared by Mr. Shaw did he realize it was June (T 392). Further, it was established that Masiello could give no details of any furnishings or paintings by Mrs. Brasco, which were prominently displayed in the congressman's

office. Doherty on describing his visit to Brasco's Brooklyn home indicated that he observed Mrs. Brasco's paintings on the walls, however, Mrs. Brasco in her testimony subsequently established that her family had recently moved into the Brooklyn home in March of 1968 and that none of her paintings had been hung in the home at that time but were instead in the Congressman's Washington, D.C. office (T 514, 2176). Frank Kilroy, Brasco's administrative assistant in Washington, also testified that he never saw Masiello in Brasco's office or anywhere at all before (T 1990). It was also established during the trial with regard to Doherty's alleged meeting with Brasco on November 15, 1968 at the Rotunda Restaurant in Washington, D.C., that Brasco returned to New York on November 14, 1968 in the company of State Senator (later Justice) William Thompson and thereafter immediately took his family to Pennsylvania where he was a guest speaker at a convention (T 2095-2100, 2127, 2130).

With respect to the alleged meeting in Brasco's law office in April of 1968, Helene Meltzer, a secretary employed in Brasco's law office in New York, Mary Coradi, his New York administrative assistant, and Daniel Cardone and Marvin Friedman, two attorneys who shared space in that office with Brasco, testified that at no time did they see or were they aware of a meeting that involved Masiello, Doherty and Weiner. All the witnesses stated that they had never seen Weiner before, a man who in fact weighed some 300 lbs. and would be unforgettable (T 1947, 1964, 2078, 2139, 2204).

## THE DEFENSE

### Brasco's Character

Seventeen witnesses, among them several congressmen, a former F.B.I. agent, a Judge, neighbors and persons involved in civic and educational offices, testified to the good character of Congressman Brasco, indicating his many good deeds and his outstanding reputation for truthfulness, honesty and veracity (T 1756, 1948, 2019, 2057, 2059, 2067, 2072, 2122, 2165, 2190, 2084, 2588, 2608, 2611). They included among them the former F.B.I. Chief of New York City, Joseph Sullivan; Congressman Koch; Congresswoman Bella Abzug; State Justices Thompson and Scholnick and many others.

### The Testimony of Congressman Brasco

Frank Brasco testified that he served the 11th Congressional District in Brooklyn and that he had been elected to that post in 1967 at the age of 33 (T 2211-2214). He was assigned to the Post Office and Civil Service Committee and was the only New York member of that committee (T 2360). He was also an attorney and had previously worked for the legal aid society and as an assistant district attorney in the Brooklyn district attorney's office from 1961 to 1966. At the time of leaving the district attorney's office, he had reached the rank of the assistant chief of the Rackets Bureau (T 2214).

Brasco stated that his congressional office handled some 200 inquiries for constituents a week regarding a variety of

problems and that he met Masiello in his Brooklyn Congressional office regarding a complaint against the post office. Brasco testified he could not remember the date of the meeting (T 2224). At that meeting Masiello had indicated to him that he had worked satisfactorily for the Post Office for 10 or 12 years and that he had been outbid by a company, one not capable of performing the contract (T 2227). Brasco discussed the matter with Masiello for 5 or 10 minutes as he had some 25-30 constituents to see that day. Brasco later referred Masiello's matter to Joseph Doherty, a congressional liaison officer for the post office, who he knew and had dealt with on other matters regarding constituent problems and he also asked his administrative assistant, Frank Kilroy, to look into the matter (T 2224, 2228). Brasco stated that he saw Doherty and called him often regarding constituent problems, legislative and political matters. He had met Joe Weiner through Doherty in 1968, and he believed that the two were involved and associated in some way. At a later time, he was informed by his Uncle Joe Brasco that he knew Masiello from the trucking business and was asked whether anything could be done (T 2230). The Congressman also stated that when he called Doherty he was informed that they were aware of the situation and were checking on it (T 2231). On subsequent occasions his office had returned Masiello's calls<sup>\*/</sup> to his office regarding the matter and arranged for forwarding information regarding A.N.R.'s prior performance to the post office (T 2235). Brasco also stated that in the early part of 1968, Masiello had complained about the losing money on the postal contracts which had eventually been obtained by A.N.R. and the

<sup>\*/</sup> Congressman Brasco's return calls to the trucker were all unsurreptitious, having openly been charged by Brasco to his congressional credit card account (T. 2295-6 ).

Congressman recalled discussing the problem with Masiello over the phone and with Thomas McKeever, an officer of A.N.R., as well as with Harry Salvan, Masiello's attorney (T 2232, 2241-42, 2327). Brasco stated that he subsequently referred the complaints to Doherty (T 2232).

The Congressman also related that in May of 1968, his uncle Joe Brasco spoke to him regarding the possibility of his (Joe Brasco's) going into partnership with Masiello, and the Congressman told his uncle that he couldn't do that since he as a Congressman was processing a complaint on A.N.R.'s behalf (T 2233). This was later told directly to Masiello as well (T 2233). Brasco testified that he was close with his uncle and they often called each other regarding family matters and to make arrangements for Joe Brasco to pick him up and take him to the airport on the Congressman's trips between New York and Washington (T 2295, 2860). Brasco also stated he never spoke with anyone regarding obtaining a letter of renewal for A.N.R. and he was unaware that such a letter had been prepared (T 2323). Brasco further testified that on May 31, 1968 he received a call from Frank Kilroy, his assistant, who told him that Tim May had called regarding A.N.R.'s contract. Brasco called Tim May, counsel for the post office, who informed him that A.N.R.'s contract would not be renewed because Masiello and McKeever had criminal backgrounds. Brasco stated that he told May he had no knowledge of such information and he asked why the post office had done business with them for many years. According to Brasco, he recalled saying to May "What kind of a check do you do, innocent people could get hurt, what

would you do if they changed their names, renew them again?" (T 2246). Brasco then indicated his agreement that A.N.R.'s contract should be cancelled and he proceeded to instruct his staff not to have anything further to do with the matter (T 2246, 2247, 2595). Brasco stated that May's information was the first that he had heard of Masiello's criminal background and he denied having learned anything about Masiello during his term of office as an assistant district attorney or of being aware that Masiello had refused to testify at a hearing of the New York State Investigation Commission in 1967 (T 2591, 2625). Brasco stated that he also did not recall speaking to Nobles or Cook of the Post Office Department regarding A.N.R. after May 31, 1968 (T 2595, 2596). Brasco recalled speaking to the two F.B.I. agents and in giving them a statement to the best of his recollection. He also stated that during their second visit, he showed them a report of the Small Business Administration which he obtained from the House Banking and Currency Committee which indicated that the government had information regarding Masiello for several years prior to 1968 and had taken no action (T 2333-2336).

During his testimony, Congressman Brasco denied ever meeting Doherty, Masiello or Weiner in his New York Law office and stated that on April 8, 1968, he was in and out of his office and had sometime during the day met with students of Jefferson High School in Brooklyn regarding the death of Martin Luther King, Jr. (T 2805). With regard to the claim that he met with Doherty on November 15, 1968 at the Rotonda Restaurant in Washington, Brasco denied the meeting and stated that he returned from

Washington on November 14, 1968 with Judge Thompson and then took his family to Pennsylvania where he attended a convention (T 2258-2262, 2519). The congressman stated that he never discussed a loan regarding A.N.R. with Weiner or Doherty and he never discussed the splitting of a finder's fee with them nor did he make any statement to them regarding Masiello's involvement in the Mafia (T 2266-2270, 2271, 2521, 2553). Brasco stated that he had seen Weiner about six times, observing him with Doherty when he happened to bump into them at Dankers Restaurant and other places in Washington, D.C. (T 2551, 2268). Brasco stated that he never told Himmel, his former law partner, to help Masiello and he had no knowledge how Masiello's name came to appear in Himmel's rolodex (T 2583-85).

Brasco stated he never saw a loan commitment letter regarding A.N.R. nor did he receive a letter from Washington Finance Company about the progress of a loan (T 2569). Brasco acknowledged introducing Doherty to Meade Esposito regarding the Humphrey campaign but he stated that in his conversation with Doherty, he never told him not to mention Masiello's name to Meade Esposito (T 2320, 2360). The Congressman also testified that he never heard of E.G. Maintenance or any other trucking company mentioned in the case other than A.N.R. prior to the trial of the matter (T 2329). Brasco further stated that he never heard anything from Doherty, Weiner, Masiello or his uncle Joe Brasco about any money being given (T 2362). Brasco stated he had no independent recollection of the contents of calls made to the parties involved, some six years earlier. He stated that with respect to Masiello,

he never initiated the calls but only returned them (T 2301, 2309). The Congressman denied any wrongdoing whatever and indicated that he had merely processed a routine matter for a person in the community (T 2232).

#### Other Defense Testimony

Frank Kilroy, Brasco's Administrative Assistant, testified that he had served with the federal government for over thirty years. He had first heard of A.N.R. when Brasco had asked him to call the Post Office Department regarding a status report on the matter. Walter Harris, another career officer and a long time friend of Kilroy's, acknowledged receiving a request for a status report from Kilroy and testified that after his inquiry, he was informed that the Post Office counsel, Tim May, would follow it up (T 2761, 2766-67). Kilroy then stated that in May of 1968, he received a call from Tim May of the Post Office who told him to inform Brasco not to have anything to do with A.N.R. because it was a bad situation. He then relayed the message to the Congressman. Shortly thereafter, Brasco informed him not to have anything further to do with the A.N.R. matter (T 1971, 1973, 1977). Mary Coradi Misiano, Brasco's New York assistant, also testified that she was instructed by the Congressman on May 31, 1968 not to have anything further to do with A.N.R. (T 2136). She also testified that the office was handling several hundred problems a week. From October 14th through November 5th, 1968, Brasco was in New York, not in Washington, campaigning. He stayed in New York after election day, through November 13th.

On Nov. 14 he returned to Washington for a one day trip. He returned to New York that same day (November 14th) in order to attend a convention with his family in Pennsylvania (T 2126, 2128, 2129).

John Strachan, New York Postmaster in 1968, testified that he never received a call from Brasco regarding A.N.R. with respect to obtaining a letter of renewal (T 2113).

#### THE VERDICT

After deliberation, the jury returned a verdict of guilty as charged on July 19, 1974.

#### THE SENTENCE

At the time of sentence, it was acknowledged by the court that it had received some 22 letters from Congressmen all over the country who had served with the appellant and who spoke highly of him. In addition, numerous letters had been received from constituents, neighbors and professional people who had known and worked with Frank Brasco. (S 393, 394). \*/ Defense counsel also pointed out that appellant's assets amounted largely to the value of his modest home in Brooklyn and that the appellant had worked in government for several years without any self

\*/ S - refers to minutes of post-conviction hearing and sentence.

aggrandizement. (S 400). The appellant himself, during the sentence colloquy, eloquently reiterated his position that he did nothing illegal and was innocent of any wrongdoing. (S 404, 411-417). At the conclusion of the colloquy and bearing in mind all of the circumstances of the case and the background of the appellant, Judge Cannella imposed a sentence of three months incarceration and a period of probation, plus a \$10,000. fine. (S 421).

#### POST-VERDICT MOTION FOR A NEW TRIAL

The facts and circumstances of the prejudicial misconduct by and in connection with the sequestered jurors, are set forth in Point I.

POINT I

THE COURT BELOW ERRED IN DENYING RULE 33 RELIEF. IT APPLIED ERRONEOUS AND IRRELEVANT LEGAL STANDARDS FOR DETERMINING (a) WHETHER REPORTED VIOLATIONS OF JURY SEQUESTRATION CREATED A CONDITION IN WHICH PREJUDICE TO APPELLANT MIGHT ARISE AND (b) WHETHER IMPROPER EXPOSURE OF JURORS TO A NEWSPAPER ARTICLE DIRECTLY RELATED TO THE TRIAL WAS PREJUDICIAL. ADDITIONALLY, THE COURT'S FINDINGS OF FACT IN THE SECOND RESPECT ARE NOT SUPPORTED BY THE RECORD AND ARE CLEARLY ERRONEOUS.

On June 12, 1974, the district judge, upon defense motion and over strenuous opposition from the Government, ordered sequestration of the jury during the entire trial.\* The Court also granted a defense motion to question each prospective juror separately as to any publicity or other notice he had about the case (Min. 6-12-74, p 7).

On two occasions during the trial, the Government moved to rescind the sequestration order, and the Court refused to do so (T 1029-1032). One specific reason was that the prosecutor had stated there were articles published in Westchester papers, to the effect that a "contract" was out on Masiello because he had cooperated with the Government. The defense had argued that such publicity would be devastating if seen by the jury, and the Government did not dispute the argument (T 1029-1032; see also T 718).

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\*/ The sequestration order provided, inter alia, that jurors could make and receive only certain monitored telephone calls (para. 9(b)); that all news concerning the trial or related to crime, trials, national or local politics "for example but not limited to 'Watergate', should be deleted (para. 9(b)); that personal visits could be permitted if the number of requests was not so great that the marshals could not handle them, and provided all necessary precautions were taken to insure "that at such meetings no discussions of events remotely related to this trial shall occur" (para. 9(d))). There was an express limit on consumption of alcohol (para. 12). The jurors did attend several movies on weekends after obtaining specific court approval, but were not permitted to attend Broadway shows or nightclubs (T 534-538).

Before sentence, appellant moved under Federal Rules of Criminal Procedure, Rule 33, for a new trial, on the ground, inter alia, of improper conduct of the jury during sequestration, upon affidavits of Dominick Barbarino, a retired New York City policeman and friend of appellant, who spoke to a number of jurors after trial<sup>\*/</sup>, and of an alternate juror, Israel Cohen.

The affidavits stated that many jurors received unmonitored telephone calls during trial<sup>\*\*/</sup> (Barbarino aff. 3, Cohen aff. 1); that two jurors were taken to their homes, one of them left alone and unsupervised for several hours (Barbarino aff., pp 3 & 9) (juror in question confirmed this); that various visits to barber and beauty shops were permitted and during one such visit, two jurors were permitted to read whatever magazines were available (Barbarino aff. p 4, Cohen aff. p 4); that Watergate articles were not deleted from papers, and that Watergate information was seen by the jury in Times Square (Barbarino aff. p 7); that on several Sundays, large open house parties were permitted with 50-60 persons present and that the 2 or 3 marshals in attendance could not monitor the numerous conversations, some of which were in foreign languages (Barbarino aff. pp 3, 8 & 13; Cohen aff. pp 2 & 3); that consumption of alcoholic beverages in excess of that permitted in the sequestration order frequently occurred (Barbarino aff. pp 10, 12, 13 & 14).

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<sup>\*/</sup> Although the Court expressed displeasure that the interviews had occurred, it specifically found nothing to indicate bad faith or harassment by Barbarino. The Court stated: "The only impression I got from that tape, very frankly, is that Mr. Barbarino did not in effect harass her; that he simply asked her questions and she answered them . . . I listened to it and that is the impression I got. He went there as a man who asked questions. He didn't tell her any lies that I was aware of. He didn't force her in any way that I was aware of. He didn't put any words in her mouth that I was aware of. And as far as I could see, there wasn't what we would characterize in this area as 'harassment'" (H. Min. 386-387).

<sup>\*\*/</sup> One juror stated that the special phone for jurors' calls was not working much of the time and that 25-30% of all calls were not monitored (Barbarino aff. p 7-8).

The affidavits also stated that a newspaper article directly pertaining to the case was not deleted from one newspaper which was available to the jury (Barbarino aff. pp 4-6, 13).

The Government's position - - adopted by the trial court - - was that all incidents, except the newspaper incident, were immaterial as a matter of law.<sup>\*/</sup> The hearing was limited to the newspaper incident, over objection that all matters raised in the affidavits should be explored (Oct. 16 Hearing min. 21-22).

At the hearing, Marie Purpo testified juror Hutton showed her an article concerning the trial late one evening (Hearing min. 13-14). Hutton was sitting in the recreation room and called her in saying, "Marie, look what I have found." (Hearing min. 26). She claimed she did not read the article but was told by Hutton it had to do with the case (Hearing min. 16). She said she glanced at it over Hutton's shoulder while he was sitting in a chair, holding the newspaper open (Hearing min. 26-27).

At first Purpo claimed she did not remember whether the article referred to Masiello (Hearing min. 16); but upon further questioning stated she knew that night "that that particular article dealt with Mr. Masiello's not appearing in court" (Hearing min. 18). She thought Petitioner's Exhibit "A"<sup>\*\*\*</sup> might be the article she saw (Hearing min. 21). She and Hutton ripped the article up and flushed it down the toilet (Hearing min. 22), because they knew it was not supposed

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<sup>\*/</sup> At legal argument on October 16, the Government stated (Hearing min. 20):  
"The rest of the things . . . I am really prepared to have the court assume [as] true for the purposes of any motions. I could care less whether a juror drank beer in his room or whether one juror was in another juror's room late in the evening or whether one juror went home and had a visit without supervision."

<sup>\*\*</sup> This exhibit was later renumbered Petitioner's Exhibit 2 and is reproduced at A 59.

to be there and this was "just, you know, a cover-up for - - we either were covering up for the other jurors not to see it or a mistake one of the marshals had done, knowing the article wasn't supposed to be in the paper" (Hearing min. 24). She said nothing to the Court but the next day she and Hutton told Marshal White, who promised to take care of it (Hearing min. 25-26). She could not remember if she told someone that Hutton read more of the article than she did (Hearing min. 28). Marshal White never reported this incident to the Court.

Purpo testified she freely spoke to Barbarino and was also willing, and did speak, to defense counsel (Hearing min 30-34). She had volunteered the information about the newspaper article (Hearing min. 36-37). She was not willing to sign an affidavit, as her mother was alarmed that she spoke to Barbarino. She refused to have anything to do with affidavits unless other jurors came forward (Hearing min. 29, 34).

In answer to questions by the Court, Purpo stated her mind was not affected by the article, it took no part in her judgment, and she did not take it into consideration during deliberation (Hearing min. 50-51).<sup>\*/</sup>

No questions were permitted to determine if she was concerned with Masiello's failure to testify, or if the reasons for his refusal were discussed or speculated upon by the jury (Hearing min. 51-52). Juror Chiang had stated to Barbarino that the jury had discussed this (See Point IV, infra).

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<sup>\*/</sup> Defense counsel unsuccessfully objected to any questioning of jurors on whether they felt prejudiced by the newspaper article (Hearing min 274-275).

Edward Hutton testified that around the time the Masiello stand-in "testified", he discussed a newspaper article with Purpo relating to the trial (Hearing min. 57). The headline was to the effect that "stand-in witness testifies for reputed Mafia figure" (Hearing min. 58). He identified Petitioner's Exhibit 1 as the article. (All the pertinent articles are reproduced in appellant's Appendix, at A 58-60).

When Hutton saw the headline in the paper he was reading, he said "it struck me immediately". He saw the name John Masiello somewhere in the article and didn't read further (Hearing min. 58-59). He testified he merely pointed out to others present that the marshals neglected to extract the article and how stupid this was because they were to take out any articles "obviously related to the case" (Hearing min. 59-60).

He stated he may have held up the article to let Purpo see it from a distance but he knew she did not read it in his presence, "unless she read it over my shoulder, which I said I don't recall" (Hearing min. 60).

Hutton testified he ripped up the article and threw it in a wastebasket (Hearing min. 62). He did not flush the pieces down the toilet, nor did he know if Purpo was with him when he destroyed the article (Hearing min. 67). He could not recall telling any marshal about the article (Hearing min. 72-80) but he did tell other jurors (Hearing min. 67, 80-81).

Hutton testified other jurors were present when he announced the article was in the paper and no one said anything at all about it (Hearing min. 70, 72). Mrs. Robbins, who was not present, later told him he did a noble thing and he thought she expressed doubts that she would have torn it up without reading it (Hearing min. 70).

Hutton admitted he had the article in his hand "half an hour, 20 minutes possibly", after he told the group he found it and before he destroyed it (Hearing min. 73).

The Court refused to permit questions as to whether any juror discussed Masiello's reluctance to testify, or said that Masiello was afraid the mob would hurt him or that Masiello didn't testify in order to protect appellant (Hearing min. 86-87).

Eric Benjamin initially testified he only knew that Hutton found an article, "tore it up or something happened to it" and had a vague recollection Hutton reported it to a marshal (Hearing min. 106) or perhaps he made a comment "to a group in attendance there and we called the marshal" (Hearing min. 108). Later he allowed as how he probably was in the room and had heard Hutton make some statement about the article (Hearing min. 111), and that Hutton possibly had the article in his possession (Hearing min. 108). At first Benjamin stated that no one else took the article out of Hutton's hand (Hearing min. 109), but then admitted he couldn't answer whether he saw Hutton do anything with the paper (Hearing min. 110).

Carmen Rivera testified she was present in the room when Hutton found the article and told them it was in the paper (Hearing min. 113). Rivera was asked about what then transpired and gave this testimony:

"Q. How long after he mentioned that he found the article . . . did he tear it up?

A. Well, after Marie read it. Marie read it and after she gave it back to him and I told him I didn't want to read it, he tore it up and threw it in the wastebasket" (Hearing min. 114).

Upon Government motion to strike this testimony, the trial judge stated he was not a lay juror and knew "she can't give the mental operation of somebody else" (Hearing min. 114-115). The Court then elicited from the witness that Purpo took the paper from Hutton, looked at it, and returned it. She didn't recall how long Purpo looked at the article (Hearing min. 115).

Marshals White and Milani testified they did not recall anyone telling them about the Masiello article. One marshal did recall being shown a paper containing an article about a civil trial in Federal Court in Brooklyn (Hearing min. 134-138).

Allen Rambach was in the recreation room when Hutton held up the paper he was reading and said:

"Hey, look, there's something here about the case that should have been cut out and he held it up and talked about it" (Hearing min. 272).

Rambach testified he did not remember what the article was about and that it did not influence his deliberations (Hearing min. 272-273).<sup>\*/</sup>

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<sup>\*/</sup> Marjorie Hall knew that Hutton found an article about the case in the recreation room (Hearing min. 103-104). Gloria Chiang was told by Purpo that something was in the paper about Masiello that wasn't supposed to be there (Hearing min. 96-101). Robbins and Anderson were told by Hutton that he found the article (Hearing min. 264-265, 335-336). Fine and Lazarou were the only jurors who had no knowledge of the incident (Hearing min. 112-123, 267, 270). The alternates were not called, even though some were in the room when the incident took place (Hearing min. 116), and even though Barthelson had said he heard or read, on the day Masiello refused to testify, that he refused because his wife was threatened (Barbarino aff. p 6).

Dominick Barbarino testified that Purpo volunteered the information about the newspaper incident. According to Barbarino, Purpo told him that Hutton called her over and showed her a censored newspaper with an article pertaining to the trial, which she started to read. She read a paragraph stating that Masiello refused to testify because he feared for his wife's life. She said she only read part, but Hutton read the whole thing. They got scared, tore it out of the paper and flushed it down a toilet. They reported it to Marshal White the next day (Hearing min. 201-202).

Purpo was willing to tell these fact to defense counsel, and after ascertaining he was home, she and Barbarino visited him (Hearing min. 202). Purpo looked at some newspaper articles but could not locate the only one she saw (Hearing min. 203-204). She agreed to look at others and to give an affidavit when she located the correct article (Hearing min. 204-205). After this, she told Barbarino her mother was upset and she now did not want to be the only juror to come forward (Hearing min. 207-208).

Barbarino testified he had taped several conversations with some of the jurors he interviewed (Hearing min. 219-223, 226, 241, 243, 245).

Randy Romaner, an attorney with the State Department of Taxation and Finance and a social acquaintance of defense counsel, testified that she was present in defense counsel's apartment the evening Barbarino and Purpo came over. She saw Purpo look at various newspaper articles, heard Purpo say she was looking for a long thing column about John Masiello fearing for his wife's life and her health (Hearing min. 300).

Herbert Lyon, defense counsel at trial, testified that when Purpo began looking through the newspaper clippings, she said she didn't have a real recollection of the article, that Hutton should be asked about it because he read more of it than she did, but she did recall it dealt with Masiello's failure to testify, because of fear for his wife's life (Hearing min. 324).

Lyon testified that Purpo expressed willingness to help by looking at additional articles because the jury had not found appellant guilty of bribery and she hoped she would be able to advise the Court of this (Hearing min. 339).

William Erlbaum, law partner of Lyon, testified he was present when Barbarino and Purpo came to Lyon's apartment at Mr. Lyon's request. Erlbaum testified Purpo said:

"that an article had been called to the attention of marshals, that she was annoyed or miffed or something that apparently she learned it had not been called to the judge's attention. That the article had to do with something which she and some of the jurors had been speculating about that Mr. Masiello had not come as a witness, and that the article had to do, apparently, with something with his reasons for not coming. And I believe she said something about Masiello's wife, but I am not sure of that . . .

She at some point said that if she saw some articles she might remember it" (Hearing min. 357).

Erlbaum also testified Purpo said that Hutton read more of the article than she had (Hearing min. 359).

No other witnesses were permitted to be called, despite defense request that the alternates who were present when Hutton found the article be called and questioned (Hearing min. 143).

Defense counsel offered to prove that on a taped conversation, juror Chiang said that the jury was concerned with the reasons for Masiello's failure to appear at the second trial and speculated that the Mafia bought him off not to testify (Hearing min. 289, 384-385). The Court rejected the offer, stating the information was "immaterial and irrelevant to the issue, and I assume as a fact that that is what appears on the tape." (Hearing min. 388)

- A. Proof of Repeated Violations of the Sequestration Order Wherein Jurors Separated and Were Exposed to Outside Contacts, Out of the Custody of Marshals, Without any Proof from the Government that the Jurors Were Not Subject to Contacts Which Might Have Swayed Them in Reaching a Verdict Mandates a New Trial. Alternatively, a Hearing Should be Held and the Government Required to Prove that the Separation Gave no Opportunity for the Exercise of Improper Influence

At common law, juries were routinely sequestered in order to protect them from outside influence while hearing and deciding a case. This practice has changed in most jurisdictions and now sequestration is granted only in those cases where the possibility of jury contamination from outside sources is actually present. In the case at bar, appellant moved for sequestration and trial court ordered it, despite Government opposition. Despite the jury sequestration, all jurors made and received unmonitored phone calls, one and possibly two jurors visited non-jurors outside the custody of the marshals, and large-scale unsupervised contact between jurors and non-jurors took place at Sunday open-houses, including conversations in foreign languages.

The Court below failed to recognize that these acts of separation sworn to in the affidavits constituted grounds for a new trial. It assumed that all the acts described did occur but held that they "at best, demonstrate violations of the Court's sequestration order . . ." (A. 29-30). The Court stated it

could not "perceive one scintilla of prejudice inuring to the defendant as a result," and held that the defendant failed to sustain his burden of proving that the acts of separation prejudiced him (A.30).

We submit that the Court below applied an erroneous legal standard in judging the gravity of these incidents; that it erred by placing the burden of proving prejudice on the defendant, and that it erred in failing to grant a new trial upon evidence of the repeated acts of separation, or at the least, in failing to hold a hearing, with the Government given the burden of proving that the separations did not create a condition in which prejudice to the appellant might arise.

There is a vast and profound difference between a sequestered and a non-sequestered jury. Where a jury is not sequestered and is permitted by the Court to separate during trial (or even during deliberation), then a defendant must show that a refusal to sequester or that acts occurring during the time the jury was separated, resulted in a substantial likelihood of prejudice to him before a new trial motion will be granted. United States v. Harris, 458 F2d 670, 674-674 (5th Cir. 1972).

The rule is entirely different, however, when sequestration (during all or part of the trial) is ordered by the Court (See e.g., Baker v. Hudspeth, 129 F2d 783 (10th Cir., 1942), People v. Maughs, 86 P 187 (S. Ct. Calif. 1906)), mandated by statute (see e.g., Lee v. State, 258 S.W.2d 743 (Ct. Cr. Ap., Ala. 1972); Adams v. Commonwealth, 221 S.W.2d 81 (C of A, Ky. 1949)): or by decisional law (see e.g., United States v. D'Antonio, 342 F2d 667 (7th Cir., 1965). In such cases one of two rules regarding separation of jurors is followed:

Jurisdictions following the strict rule hold that where separation<sup>\*/</sup> during sequestration has occurred, this is error requiring a new trial unless the prosecution can prove that the jurors were not exposed to situations influenced during which they might have been/ United States v. Panczko, 353 F2d 676, 678 (7th Cir. 1965). (Court allowed jury to separate during deliberation in violation of United States v. D'Antonio, supra. New trial granted as this had the effect of "exposing the released jurors to exposure to those who might, by printed or spoken word, attempt to influence their official action . . ."); Adams v. Commonwealth, supra, 221 S.W.2d at 82 (jury member separated for five minutes and mingled in crowd at courthouse. "There is no evidence showing that anyone spoke to [the juror] or the other members of the jury during separation. It is obvious, however, that there was ample opportunity for this to have happened."); Lee v. State, supra, 258 So. 2d at 744-745; People v. Thornton, 16 P 244, 245-246 (S. Ct. Calif. 1888) ("if the separation was such that the juror might have been improperly influenced by others, the verdict should be set aside, and the affidavit of the juror could not be admitted to purge his conduct from the imputation of corruption or impropriety.")

The rationale behind the strict rule was given in People v. Maughs, supra, 86 P at 192, where a court order of sequestration was violated:

"while the commisison of the jury to the custody of the sheriff during the trial of a criminal case is discretionary with the court, when the court has once exercised that discretion the law contemplates that it

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<sup>\*/</sup> Separation is a term of art meaning withdrawal of a juror from the sight or control of the officer in attendance. 23A CJS Criminal Law, Section 1356, p 955. Where "the separation of jurors complained of consisted of their going into lavatories and closets, drug and other stores, under the surveillance of marshals, there was no separation in fact." United States v. D'Antonio, supra, 342 F2d at 670.

is exercised quite as much for the rights of the defendant as for the rights of the people. If the jury is liable to be subject to improper influences, if there is danger of this, which is the ground calling for the exercise of judicial discretion, in the purview of the law those influences may as likely be exercised against the defendant as in his favor. There is absolutely no warrant in the law for the course the jury adopted, and the order permitting the jury to separate was error; and indeed the brief of the state offers no word in extenuation or justification of it."

Other jurisdictions follow a slightly modified rule and hold that once a separation has occurred from the sequestered jury, then the prosecution has the burden of establishing that <sup>occurring</sup> all the contacts/during the separation were innocent ones which did not prejudice the defendant. Cavness v. United States, 187 F2d 719, 723 (5th Cir. 1951) (prosecution's burden satisfied by proving that two phone calls made by juror, in the presence of a marshal, after the jury had retired to deliberate, were only to arrange for the locking of his car and to excuse himself from choir practice.) State v. Duguay, 178 A2d 129, 132 (S. Ct. ME, 1962) (prosecution proved no opportunity for prejudice existed by showing that the only conversation during separation consisted of a request by the foreman's wife to another juror that if her husband needed anything, to tell her) Armstrong v. State, 144 S.W. 195, 196 (S. Ct. Ark. 1912) (juror went home to sick wife without being accompanied by sheriff. ". . . such separation is prima facie ground for a new trial, unless it affirmatively appears that the separating juror was not subjected to any noxious influence." Since the prosecution failed to prove what occurred during the separation, a new trial was granted.) \*/

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\*/ In cases involving non-sequestered juries, the rule is that where outside contacts with jurors occur, a new trial must be ordered if the conceded facts conclusively show prejudice, and otherwise a hearing must be held "in which the facts can be established, with the government having the burden of showing that any such contact 'was harmless to the defendant,'" United States v. Gersh, 328 F2d 460, 464 (2d Cir. 1964).

In Baker v. Hudspeth, supra - - a case erroneously relied upon by the trial court as sustaining its decision to treat the sequestration violations as irrelevant - - the Tenth Circuit endorsed the modified rule. The jurors were sequestered and the defendant alleged that during sequestration there was "(1) illegal association of jurors with [the marshals] and prejudicial instructions to the jurors by the . . . marshals; (2) use of intoxicating liquor by the jurors during the course of the trial . . ." (129 F2d at 780) A "complete hearing" was held and relief denied. (129 F2d at 781) The Tenth Circuit noted that the purpose of sequestration is to insure that nothing the jurors "read, see, or hear shall influence them in the consideration of the case committed to them." It further stated:

"If it is made to appear that a jury . . . is subjected or exposed to any matter or thing which might tend to prejudice or influence their consideration of the case, or if behavior of any member thereof is unbecoming to a gentleman of the jury, a presumption arises against impartiality and that presumption can only be rebutted by a clear and positive showing that such matter, thing or behavior did not influence their verdict." 129 F2d at 782

However, the facts shown in the district court failed to establish that the jury was exposed to any illegal influence<sup>\*/</sup> by the marshals and the Court refused to hold that convivial association between the marshals and jurors even

<sup>\*/</sup> Compare Gonzalez v. Beto, 405 U.S. 1052 (1972), where a new trial was ordered on proof that the sheriff, a key prosecution witness and keeper of the jury, had substantial association with the jury during a one day trial. The Court held that proof of such association was inherently prejudicial. In Baker v. Hudspeth, supra, there was nothing to suggest that the marshals were trial witnesses or that they said anything which might influence the jury against the defendants as occurred in Parker v. Gladden, 385 U.S. 363 (1966). United States v. Gilbert, 25 F Cases 1287, 1310 (No 15,205) (C.C.D. Mass. 1834), cited by the trial court (A.39), is another case involving alleged misconduct by jury custodians. There the court held that the fact marshals gave jurors censored newspapers excised of "everything that in any manner related to the trial" was not an irregularity which "justly leads to the suspicion of improper influence, or effect, on the conduct or acts of the jurors."

where hard liquor was consumed, amounted to misconduct, per se.

The case at bar involves a totally different set of circumstances. There was no issue in Baker v. Hudspeth, supra, as to unmonitored phone calls between jurors and non-jurors, such as was recounted in the affidavits in this case. One particular incident here - - that of the unsupervised visits of Lazarou and Anderson to their homes - - is extremely disturbing because they lived in Scarsdale and Yonkers, areas where the Government acknowledged during trial that publicity had been widely circulated concerning Masiello's refusal to testify because of his wife's fear of a mob contract on his life (T 1029-1032; T 718).

As to the unmonitored phone calls and unsupervised Sunday parties of 50-60 persons, it must be noted that these are not accounts of one or two isolated instances of innocuous contact, but of repeated and extensive contact involving unlimited opportunity for juror contamination.

Lazarou also stated to Barbarino that "during jury deliberations a juror (Chiang) brought up the Watergate affair and stated that in her opinion the defendant was involved in it. (Hearing min. 245)

Barthelson said that articles concerning Watergate were not excised from reading material given to jurors (Barbarino aff. 697). The order of sequestration specifically prohibited any exposure of jurors to news relating to Watergate (Sequestration order, par.9(b))

The basis for the request by the appellant for sequestration was the very fact that there had been considerable pre-trial publicity in the media

accusing Congressman Frahk Brasco of having voted in the House Banking and Currency Committee against an investigation by that body of the Watergate scandal. The media accused Brasco of so voting in October 1972, in exchange for an alleged deal with the Justice Department to drop the instant case in 1970. The media further alleged that Meade Esposito, Kings County Democratic Leader, acted as intermediary in the deal.

It appears that in spite of the sequestration order, at least some of the jurors (who testified before they were chosen that they had seen no publicity linking Brasco to Watergate) must have been exposed to such publicity in the media during their sequestration.

Even the accounts of excessive drinking in this case were quantitatively different than in Baker, for here the foreman of the jury resigned from jury service after a night of excessive drinking, because he felt unable to continue as a juror.<sup>\*/</sup> (Barbarino aff. p 12).

In the jurisdictions which apply the strict rule, the evidence presented by affidavit to the trial judge below, together with the Government's concession that these incidents had occurred, would be sufficient to require setting aside the verdict. For in the numerous instances of unsupervised juror separation called to the court's attention, "sufficient opportunity [was] afforded for the exercise of improper influence on one or more jurors," and the prosecution could not successfully claim that these separations were innocuous ones which

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<sup>\*/</sup> Although we realize that jurors are no longer deprived of food or drink to force solemn deliberation, the appellant's dismay about the juror's drinking expressed at sentence, was well taken:

"Maybe I should say something for the jurors who I would have hoped were praying the night before . . . deliberating, but not getting drunk." (Sentence minutes, p 406).

"gave no opportunity for the exercise of improper influence." Adams v. Commonwealth, supra, 221 S.W.2d at 85.

There is much to commend the adoption of the strict rule in this case.

The trial court recognized that defense attorneys rarely move for sequestration because of the widespread fear that its benefits are far outweighed by its potential for prejudice.<sup>\*/</sup> Where the potential for contamination of a non-sequestered jury is great enough that the defendant is willing to assume the other risks inherent in sequestration -- as the appellant did in this case -- then it is incumbent upon the Court who grants the motion to insure that the defendant gets the full benefit of a jury free from any risk of contamination.

In this case, a number of inherently prejudicial factors motivated appellant to move for a sequestered jury -- the fact that there had been extensive publicity about the case; the fact that ugly rumors had been published that appellant's prosecution had been delayed because he played "ball with" persons involved in the Watergate coverup; the fact that many people assume politicians are corrupt and are most vocal in expressing such opinions; the fact that a politician with an Italian name and background alleged to have associated corruptly with Italian-named mob figures bears the burden of proving his innocence to a not-infinitesimal segment of society. The careful voir dire of each juror

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<sup>\*/</sup> The trial court noted that this was only the second motion by defense counsel which anyone could recall taking place in the Southern District in the past twenty-six years (Argument on sequestration motion, 6/12/74, p.8).

separately on the publicity issue could minimize the chance of selecting biased jurors, (see supra 38). But the only way to insure that biased persons outside the jury did not seek to make their prejudices known to jurors was to cordon off the jurors from the outside public with a sequestration order. Because that order was violated - - not once or twice, but wholesale - - there is no longer any assurance that biased persons did not attempt to influence jurors' opinions either directly or by subtle insinuation.\*/ The modified rule may be fitting in the ordinary case where the outside atmosphere is not too charged with the potential for bias; but it is not suited for a case like this where the potential for prejudicial contact is palpably present in the community..

This is a case where the trial court ordered sequestration:

"in order to insure to the defendant a fair trial by impartial jury, and to insulate that jury from any extrajudicial statements and such other matters as might interfere with their ability to render a fair verdict in the trial of this case . . ." (Sequestration order, June 20, 1974).

If the only way to insure a fair trial was by sequestration, then proof that the sequestration order was repeatedly violated and did not insulate the jury from outside contact requires a new trial.

There is another reason in favor of the strict rule. The defense has no way of knowing if and when a sequestration order is violated. Short of hiring private detectives to keep 24 hour watch on all jurors and report any misconduct (which undoubtedly would be viewed as tampering and prohibited), the

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\*/ In Lee v. State, supra, 258 So. 2d at 745, the court reasons that the strict rule is the only "safeguard against the hazard of outside contacts which may, with no fault of the juror, so enter into his thinking as to influence the verdict."

defense can only rely upon the good faith of the Government custodians to report any questionable incident,<sup>\*/</sup> so that its prejudicial effect can be determined and necessary action taken to cure the prejudice prior to verdict. As we point out below (infra, 67-68 ), careful instructions by the trial court or replacement of jurors can be resorted to, prior to verdict, to minimize any possible prejudice to the defendant and to insure a fair verdict. But when the incidents are not reported, and nothing is done before deliberation to remove the possible prejudice, then the only way to insure a fair trial is to follow the strict rule and set aside the verdict.

Additionally, the very fact that so many violations of the sequestration order occurred makes this a fitting case for application of the strict rule. We can see that one unauthorized separation of one juror during a lengthy trial might not be a sufficient demonstration of potential prejudice to motivate reversal.<sup>\*\*/</sup> However, where virtually all the jurors have so little regard for the conditions of sequestration that they repeatedly put themselves into illegal unsupervised contact with outsiders, then we feel we can also assume that they did not take seriously their obligation not to discuss this case, or listen to whatever the outsiders may have said about the appellant. Cf. Silverthorne v. United States, 400 F2d 627, 641 (9th Cir. 1968), where the repeated reading of newspapers by a

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<sup>\*/</sup> As the prosecution did on one occasion when a juror bumped into a Strike Force secretary in a drug store (T 3013-3014). This incident then was fully explored on the record (T 3343, et seq.).

<sup>\*\*/</sup> United States v. Berger, 433 F2d 680 (2d Cir. 1970), where one juror misunderstood the sequestration order and spent a night with her husband, but did not read about the case or discuss it with anyone; compare Adams v. Commonwealth, supra, where one five-minute unsupervised separation was sufficient basis for granting a new trial.

non-sequestered jury impelled the court to lay aside the ordinary assumption that the jury has followed the court's instructions to avoid reading about the case on trial. As was said in Turner v. Louisiana, 379 U.S. 466 (1965), where a new trial was ordered upon proof that the sheriff, a prosecution witness, was custodian of the jury even though there was specific testimony that he never discussed the case with any one of them (at 469 n.5):

"... the potentialities of what went on outside the courtroom during the three days of trial may well have made these courtroom proceedings little more than a hollow formality." 379 U.S. at 473 (emphasis added)

In Gonzalez v. Beto, Parker v. Gladden and Turner v. Louisiana, *supra*, the Court recognized that where the unauthorized conduct involves such a probability that prejudice will result, then a due process violation results.<sup>\*/</sup> We believe that the repeated violations of the sequestration order wherein jurors were continually exposed to unsupervised contacts with outsiders amounts to a course of unauthorized conduct involving such a degree of prejudice that appellant's right to trial by fair and impartial jury was violated. On this basis alone, we submit that a new trial must be granted.

Even assuming that the court is unwilling to grant a new trial on the record as it now exists, at the least appellant is entitled to a hearing conducted under proper standards of law and proof. At such hearing the government should be required to account for every instance of unauthorized separation resulting in unsupervised contact between jurors and non-jurors; to prove what

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<sup>\*/</sup> Cf. United States v. Adams, 385 F.2d 548, 550-51 (2d Cir., 1967), where writings not in evidence were sent to the jury and even though no prejudice was demonstrated, this Court ordered a new trial, because the principle that the jury may see only matters in evidence "is so fundamental that a breach of it should not be condoned if there is the slightest possibility that harm could have resulted."

newspapers or news/radiocasts relating to the trial were published during the time the two jurors had unsupervised home visits; and to affirmatively demonstrate that all of the unauthorized contact was "harmless to the defendant." United States v. Gersh, supra, 328 F2d at 464. If the government cannot sustain its burden of proof, then a new trial must be ordered.

- (B) The Trial Court Applied an Erroneous Legal Standard to Determine the Necessity for a New Trial Because of Improper Exposure of Sequestered Jurors to a Newspaper Article Directly Relating to the Trial. Moreover, Its Findings of Fact in This Respect Are Clearly Erroneous. This Court Must Grant a New Trial on This Basis or Remand for a Proper Hearing.
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After hearing some evidence<sup>\*/</sup> on the newspaper article incident, the trial court denied relief, holding:

"...the Court finds that defendant has failed to sustain his burden of proving that any juror who came into contact with the newspaper article was thereby prejudiced against him or that the incident in any manner acted to impair his securing of a fair trial. 'Even if the jurors read the article referred to, that alone is not ground for a new trial. . . . The burden was upon counsel for defendant to show that prejudice resulted, and he failed to establish such prejudice.' Gicinto v. United States, 212 F2d 8, 10-11 (8 Cir.), cert. denied, 348 U.S. 884 (1954)."

There are a number of things wrong with this ruling: First, there is no burden on the defendant to prove that any juror in contact with the article

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<sup>\*/</sup> The court refused a defense request to call and question alternate jurors who had knowledge of the newspaper article (H. min. p. 143).

was thereby prejudiced against him. The proper test is an objective one wherein the court must assess for itself the likelihood that the extraneous influence would affect a typical juror. United States v. Miller, 403 F2d 77, 83 n.11 (2d Cir., 1968); United States ex rel Owen v. McMann, 435 F2d 813, 819-20 (2 Cir., 1970); United States v. Gersh, supra; United States v. Crosby, 294 F2d 928, 950 (2d Cir., 1961).<sup>\*/</sup>

Second, the trial court improperly relied upon the jurors' testimony that their "judgment in this case was not affected by this extrajudicial account and that he was not prejudiced against the defendant in any fashion whatsoever because of it." (A. 29) If a jury is confronted with matters not in evidence so that a defendant loses his right of confrontation, prejudice is presumed and no inquiry into the effect upon the minds of the jurors is necessary. Parker v. Gladden, supra; Marshall v. United States, 360 U.S. 310 (1959); Mattox v. United States, 146 U.S. 140, 149 (1893); Remmer v. United States, 350 U.S. 377 (1955); United States v. McKinney, 429 F2d 1019, 1024 (5th Cir., 1970). The rule barring inquiry into jurors' thought processes is no different where the attempt is to save the verdict. "Rather than engage in such speculation, it is better to determine whether the 'capacity for adverse prejudice inheres in the condition or event itself.'" A.B.A. Standards, Trial by Jury § 5.7a, p. 172, Marshall v. United States, supra.

The court below, erroneously we submit, believed that these long-standing principles had been undone by the Rattenni case, supra.<sup>\*\*/</sup> Rattenni

<sup>\*/</sup> Defense counsel below argued that the objective test was the proper one to use, however the court refused to apply it because of his interpretation of the holding in United States v. Rattenni, 480 F2d 195 (2d Cir., 1973). (H. min., pp. 274-76)

<sup>\*\*/</sup> It is an interesting side note that when the trial court stated its interpretation of the Rattenni holding, the assistant United States Attorney below did not recognize the case, even though he had argued it in this Court. (H. min. p. 276)

involved a rather extraordinary situation where a juror actually admitted being prejudiced by a newsbroadcast she heard after a verdict had been returned on one count but before deliberation was complete on several others. A mistrial was declared as to the open counts, but the trial court refused to set aside the verdict previously returned. There was evidence that before the verdict had been rendered, the same juror read a news account containing the somewhat same kind of information as had prejudiced her in the radio account, however she "disclaimed prejudice from the newspaper article. . ." (480 F2d at 197) The court did not remand the case for a hearing to determine whether the newspaper article actually prejudiced the juror. It reversed and ordered a new trial, holding:

"Since that same juror had expressly identified as prejudicial those aspects of the radio broadcast relating to prior indictments against appellant, and since the newspaper article which she read shortly before rendering the verdict on Count One also referred to conviction on a prior indictment, it was necessary under the circumstances to set aside the verdict rendered on the previous evening."  
480 F2d at 197-198

Since the court did not deem it critical to hold a hearing and determine whether the jurors would admit of prejudice before reversing the conviction, the case cannot be construed, as it was by the court below, as holding that such an admission of prejudice by the juror exposed to a newspaper is necessary before a verdict can be set aside.

Moreover, even assuming the case can be construed to mean that a verdict must be set aside where one juror admits prejudice, it is certainly not authority for the converse: that a verdict will never be set aside if no juror admits prejudice. For in both Remmer v. United States, supra, and Marshall v. United States, supra, new trials were ordered even though the jurors exposed to the

outside events disclaimed prejudice.<sup>\*/</sup> See also United States v. Montgomery, 42 F2d 254, 256 (S.D.N.Y., 1930), where the court stated if jurors acknowledged prejudice, a mistrial would be granted but "if on the other hand, they stated they could still decide the case on the evidence before them, it would be for me to determine whether I regarded it as safe to take them at their word."

In short, the trial court failed to apply a proper legal standard in determining whether the admitted improper exposure of jurors to an article relating to the trial was prejudicial to appellant.<sup>\*\*/</sup> The court also made findings of fact which are not supported by the record and are clearly erroneous.

The court found the juror Purpo had not read the article, believing her in-court disclaimers, notwithstanding her prior inconsistent statements testified to by three attorneys and the retired police officer (A 57 ). However, in coming to this conclusion, the court failed to consider the in-court testimony of Rivera, who was present when the incident occurred and who testified she saw Purpo read the article, (H. min., p. 114) apparently on the ground (given

<sup>\*/</sup> In Marshall v. United States, supra, 360 U.S. at 312, "Each of the seven told the trial judge that he would not be influenced by the news articles, that he could decide the case only on the evidence of record, and that he felt no prejudice against petitioner as a result of the articles." In Remmer v. United States, supra, 350 U.S. at 379, the trial judge had found that the incident at issue "had no effect whatever upon the judgment, or the integrity or state of mind" of [the juror] whom the court found to be 'an honest and forthright man.'"

<sup>\*\*/</sup> The court also relied upon cases which did not involve the reading of forbidden material by sequestered jurors. Most of the cases dealt with the exposure of non-sequestered jurors to news articles, with the issue being whether, when the incident was brought to the trial court's attention before verdict, careful instructions by the court to disregard the article were sufficient to cure the error and insure that prejudice to the defendant did not occur. See eg. United States v. D'Andrea, 495 F2d 1170 (3d Cir., 1974); United States v. Wilshire Oil, 427 F2d 969 (10th Cir., 1970); United States v. Rucks, 339 F. Supp. 249 Aff'd. 481 F2d 1112 (4th Cir., 1973); United States v. Amone, 363 F2d 335 (2d Cir., 1961). Other cases relied upon either pre-dated Marshall and Remmer, supra (United States v. Bractcher, 149 F2d 742 (4th Cir., 1945); Gicinto v. United States, 212 F2d 8 (8th Cir., 1954)) or involve improper attempts to explore internal mental operations (United States v. Procario, 356 F2d 614 (2 Cir., 1966)) or allegations of prejudice resulting from a fifteen minute contact between a juror and a defendant eight years before trial (United States v. Cashio, 420 F2d 1132 (5th Cir., 1970)).

when Rivera testified) that Rivera could not give an opinion to the mental operations of another (H. min., p. 114-115).

The trial court erred in failing to consider Rivera's testimony, as it was perfectly proper testimony, based on the observations of her own eyes, as to a matter of common -- not expert -- knowledge.

"There is no general rule excluding conclusions based on personal observations and common experience as to the physical conditions or actions of another." United States v. Alexander, 415 F2d 1352, 1357 (7th Cir., 1969)

". . . lay witnesses are frequently permitted to use so-called 'shorthand descriptions, in reality opinions, in presenting to the court their impression of what transpired. This is the common sense view that leaves the witness free to speak in ordinary language, unbewildered by the judge's admonition to testify to facts, when the witness is sure he is testifying to the facts." Stone v. United States, 385 F2d 713, 714 (10th Cir., 1967) (emphasis in the original)

The common sense view has long been the rule in this Circuit, the Court of the opinion that a contrary view is often "a substantial obstacle to developing the truth. . ." United States v. Petrone, 185 F2d 334, 336 (2d Cir., 1950)

Rivera's assessment of what Purpo did with the paper was candid and straightforward, as was the whole of her testimony. Unlike Purpo, she refused to look at the article when Hutton offered to show it to her, and hence she had no reason to attempt to white wash her role in the whole affair. Purpo, straight off the bat, had been admonished of her Fifth Amendment right not to incriminate herself, and perhaps believed that she should pull in her horns (H. min., p.11-12<sup>\*/</sup>)

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<sup>\*/</sup> The United States attorney had also called upon a grand jury to hear testimony to determine whether anyone made false statements or was attempting to obstruct justice.

Her testimony, and that of Hutton, "the two principal offenders," (A. 24) was contradictory in every detail.

Hutton claimed he made a casual announcement to those already assembled that he found an article the marshals neglected to censor (H. min. p.72). Purpo testified Hutton called her into the recreation room, saying, "Marie, look what I have found." (H. min. p. 26) Rivera said Hutton showed the article to Purpo and Purpo took it from his hand (H. min. p. 115). Purpo swore she only glanced at it over Hutton's shoulder (H. min. p. 26). Hutton said he only held it up and let Purpo see it from a distance (H. min. p. 60). Hutton said he kept the article in his hand, to keep other jurors from seeing it (H. min. p. 74). Rivera testified he destroyed it only after she told him she did not want to see it (H. min. p. 114). Purpo testified they both tore up the article and flushed it down a toilet. (H. min. p. 22). Hutton said he had no recollection of this, and anyway he tore it up and threw it in a waste basket (H. min. p. 67). Purpo said they told the marshals (H. min. p. 25); Hutton did not remember going to the marshalls (H. min. p. 78). The marshals testified no one reported finding this article, although the jurors had reported finding an article dealing with a civil trial in federal court. (H. min. p. 134-138). Purpo testified Hutton told her the article dealt with Masiello's failure to testify (H. min. p. 118). Hutton testified he had no recollection of telling Purpo anything about the article (H. min. p. 67). Hutton at first implied he ripped up the article immediately (H. min. p. 62-72) but later admitted that he held onto the article for 20-30 minutes after he found out what it contained (H. min. p. 72-73). Hutton made much of the fact he was later commended by juror Robbins for doing a "noble thing" (H. min. p. 70); Purpo called it their "cover-up". . . "knowing the article wasn't supposed to be in the paper." (H. min. p. 24)

If Hutton and Purpo were not covering anything up but merely wanted to insure that the jury was not exposed to this kind of article in violation of their obligations, normal behavior would be to give the paper containing the article to the marshal's staff, ask them to inquire if other jurors had read the paper and request that they make sure the censor was more careful in the future. However, whenever a document is destroyed, there is a reasonable suspicion of fraud (IV Wigmore, Evidence, § 1199, p. 460) and the inference that the party destroying the evidence has demonstrated a consciousness of guilt. II Wigmore, Evidence, §§ 275, 278.

Given these flat contradictions on every material detail, the destruction of the article without ascertaining whether others had read it and without reporting it, Rivera's testimony that she saw Purpo read the article, and Purpo's out of court admissions, the trial court's finding that Purpo's denial she read the article could be credited is not supported by the record and is clearly erroneous.\* / Compare Morgan v. United States, 399 F2d 93 (5th Cir., 1968). The only fair interpretation of the whole record is that at least one and possibly both these persons had read the article in question.

The question thus becomes whether, under an objective test, "the tendency of the article was injurious to the defendant." Mattox v. United States, supra, 146 U.S. at 150. We submit that the content of the article, in the context of the trial, was highly prejudicial under any objective standard.

Defense counsel strenuously objected to the use of Masiello's prior testimony and with good reason. At the first trial, to dispel any notion that appellant -- the Italian politician -- was under Mafia influence and control,

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\* / No similar finding of fact was made as to Hutton.

the defense was able to establish that Masiello specifically refused to make a case against any mob figure, and was only willing to testify against Brasco. Counsel had argued (with obvious effect) that the very fact that Masiello appeared on the witness stand against Brasco was its own proof that Brasco was not tied up with the mob, and was also proof that Brasco meant so little to Masiello that he would go to any lengths to incriminate him to buy his own freedom.

Once the court below ruled that Masiello did not have to appear as a live witness, there was enormous danger that exactly the opposite inference might be drawn. If any hint that there were mob threats to keep Masiello off the stand got through to the jury, then the trial would be poisoned. For then the jury might speculate -- wholly without foundation -- that the mob had rallied around Brasco to force Masiello not to appear as a witness against him.

Moreover, it had been brought out by the government at the first trial that Masiello was being guarded by armed marshals as he testified, and this testimony was read into the record at the present trial, over objection (T 1791, 1875). Once the jury saw that Masiello did not appear at this trial, then speculation about mob violence to keep him from accusing Brasco was likely to occur. Any newspaper reports of a mob contract on Masiello were deadly, because the very fact of Masiello's non-appearance on the stand would tend to confirm their truth. The statement from juror Chiang merely confirms the inevitable: that the jurors did speculate that the Mafia kept Masiello from testifying against Brasco (H. min. 289, 384-85).

The very fear of prejudice to Brasco in exactly this respect was the precise reason for the trial court's refusal to rescind the sequestration order during the trial.

During argument on de-sequestration, the government, with commendable candor, stated that articles had been published in Westchester (where

many jurors lived) that the mob put out a contract on Masiello and that his wife was in terror he would be killed (T 718-19, 793-95). Defense counsel strenuously opposed de-sequestration, arguing that such articles in this case were "disasterous" to the defense, since the government's theory, which it never proved, was that Brasco helped Masiello to ingratiate himself with the mob and to get Mafia support. (T 793-94). There was no dispute as to the prejudicial effect but some suggestion that jury contamination could be prevented if the court somehow sealed the Masiello testimony (T 794). The court refused to lift the sequestration order after listening to the argument.

The article seen by Purpo and Hutton was precisely that sort of newspaper publicity which the trial court attempted to keep from the jury by maintaining the sequestration order in effect. Since sequestration was maintained in order to keep this kind of article from infecting the jury, there can be no doubt that exposure of jurors to the article was inherently prejudicial and requires a new trial.

This case is no different than Marshall v. United States, supra, where a new trial was ordered because jurors were exposed to information which the trial court previously held inadmissible in evidence because of its potential for prejudice. The Court held that where the trial court holds that jurors should not be exposed to certain information in the trial forum (where the defendant has the ability to diminish its impact through confrontation) then their out-of-court exposure to it is ipso facto fraught with the potential for prejudice. A new trial must be ordered even when the jurors disclaim prejudice, as all of them did in Marshall.

In Coppedge v. United States, 172 F2d 504 (D.C. Cir., 1959), a witness refused to be sworn, stating outside the presence of the jury that his refusal to testify was based on fear of the defendant. News articles carried this story, and the court made some examination of the jurors prior to verdict, receiving assurances from the jurors exposed to the article that they could ignore it and bring in a fair verdict. The court of appeals reversed, relying on Marshall and finding that no reasonable juror could erase the prejudice from his mind. See also State v. Caine, 111 NW 443, 446 (Supreme Court Iowa, 1907) where a new trial was granted because of exposure of jurors to outside newspaper stories which were not lurid or **sensational**, the court holding:

"The unconscious influence of such accounts would be far more likely to effect the result than an influence of which they were conscious, and which they might the more readily resist."

The only cases where juror exposure to newspaper publicity about the trial is not deemed prejudicial are those where the trial court, being made aware of such juror exposure, has taken great pains before verdict to instruct jurors to disregard it. See United States v. Leviton, 193 F2d 848, 857 (2d Cir., 1951) (court not only gave careful instructions to disregard, but went on to point out the inaccuracies in the article); United States v. Baker, 442 F2d 1024 (2d Cir., 1971) (court gave careful instructions to disregard and carefully pointed out error in the article during the charge); United States v. Rucks, *supra*, where the jury was told not to read papers and a hearing established that they had obeyed the court's instructions; compare United States v. Kum Sing Seo, 300 F2d 623, 625 (3d Cir., 1962), where jurors were exposed to an article that defendant was held on \$100,000 bail.

The court held:

"Had the prosecution brought these facts to the attention of the jury and had the trial judge immediately directed the jury to disregard them in the strongest of language, a difficult issue of whether or not the prosecutor's comment was so prejudicial as to require a new trial would remain for determination. Here information of bail so high as to engender suspicion that the defendant perhaps was a notorious or dangerous criminal went naked to the jury, without any opportunity for palliation by the trial judge."

In this case, had the prosecutor let the forbidden information slip out in court -- or even if the jurors had been candid enough to call the incident to the court's attention when it occurred -- then the trial judge could have taken steps to minimize prejudice by specific instructions that the jury was to put the information out of their minds and to decide the case only on the evidence presented in court. Or the court could have conducted an examination of the jurors and replaced the exposed jurors with alternates.<sup>\*/</sup> But the jurors never came forward. Instead, they covered up the incident by destroying the article, and in doing so, destroyed any opportunity to cure the error. Everyone -- judge, prosecutor and defense -- could and did assume that the very fact of jury sequestration, insured that no news articles about Masiello's refusal to testify had reached the jurors. But this assumption was totally wrong. We are left with juror exposure to the article, with Barthelson stating that he heard or read on the day Masiello refused to testify that he refused because his wife had been threatened (Barbarino aff. p. 6), and with Chiang's recorded statement (which the trial court excluded from the hearing) that when the jury speculated as to why Masiello didn't take the stand, someone said he was kept off by the Mafia (H. min. pp. 384-5).

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<sup>\*/</sup> Certainly defense counsel would also have taken steps in summation to counter the prejudice.

When a jury is not sequestered, newspaper publicity is a fact of life that all must live with, and that the court can attempt to counteract by careful instructions. See generally, A.B.A. Standards Relating to Fair Trial & Free Press, § 3.5, and commentary. And where a non-sequestered jury is properly instructed to disregard news reports of the trial, no prejudice can be presumed from juror contact with forbidden information. But where the jury is sequestered, and no such instructions are ever given, then there can be no assurance either that the out-of-court information was disregarded, or that it had no effect upon the jurors' deliberation. Any breach into the sequestration by forbidden material must be regarded as prejudicial, in the same way that prejudice is presumed when proper instructions are not given to the non-sequestered jury.

In Briggs v. United States, 221 F2d 636 (6th Cir., 1955), a non-sequestered jury was exposed to prejudicial news publicity and no instructions to guard against possible prejudice from reading articles was given. The court granted a new trial although "there was no direct evidence in this case that the newspaper articles were read by any juror" and it was only probable that one or more jurors had done so. (221 F2d at 639) The court reasoned that since the presence of instructions is sufficient to avoid prejudice where there is exposure to news articles, the absence of instructions in the same circumstances creates "a condition from which prejudice might arise or from which the general public would suspect that the jury might be influenced to reach a verdict on the ground of bias or prejudice." (221 F2d at 639-640) Cf. United States v. McKinney, supra, 420 F2d at 1025.

We submit that this verdict must be vacated. There can be no assurance that exposure of Purpo and Hutton to the very kind of newspaper article which required continuance of sequestration did not create a condition of irreparable prejudice, especially since there were never instructions or inquiry

prior to deliberation designed to erase its impact from the minds of these jurors. Moreover, when this incident is put in the perspective of the other repeated violations of jury sequestration wherein jurors had extensive unsupervised contact with outsiders, the conclusion is inescapable that sequestration was no safeguard at all against jury contamination from prejudicial publicity. As in Marshall, Mattox, Briggs, Kum Sing Seo, Coppedge, supra, the potential for prejudice was so great that the only remedy is a new trial — either on due process grounds or in the exercise of the supervisory power to formulate and apply proper standards of criminal justice in federal trials.

Alternatively, there should be a remand for a new hearing, under proper instruction by this Court, to be held before another Federal district judge, where all jurors and alternates are questioned as to their knowledge of the incident, as to whether they read the article before Hutton picked up the paper, and as to whether speculation occurred that Masiello's refusal to testify was induced by mob pressure to coerce him to refrain from incriminating appellant.

#### The Conceded Misconduct of the Marshalls

For the purpose of the hearing on the motion for a new trial the government took the position that it conceded everything in the movant's supporting papers, except for those portions relevant to the newspaper above discussed. The affidavits present a picture of scandalous behaviour on the part of the marshalls to the extent of their making scandalous accusations about the jurors. The accusations which the jurors related to Mr. Barbarino were so scandalous that the trial judge excised that portion of Barbarino's affidavit (pg. 11, par. 3) which is on file with this court.

Appellant shall submit a copy of the papers in the original form, as an exhibit to aid this court.

Evidently the jurors had a committee who forced a retraction from the marshalls. The picture that emerges is one of a running battle between the marshalls and the jury which culminated in a written complaint from the foreman to the judge. The judge interviewed the foreman and then allowed the foreman to withdraw after characterizing him as "obviously hysterical" (T 3266).

Only from reading Barbarino's affidavit in detail can one fully appreciate the atmosphere that ended with the emotional breakdown of the foreman.

The government's concession raises a question concerning which appellant asks this court to rule: May the government, through its marshalls abuse, insult and otherwise mistreat the jurors entrusted to the care of the government and nevertheless deny to a defendant in a criminal case his claim that he has not been given a fair trial?

Only the government maintains supervision of a sequestered jury. Only the government monitors the quality of the supervision. The defendant is denied an opportunity to have his representatives observe the quality of the supervision given by the marshalls. In the instant case the defendant requested the sequestration and thus bargained for a protected jury, not an abused one.

The government violated this bargain and by its rules prevented the defendant from seeing whether the bargain had been violated. The defendant is likewise discouraged by the government (through its courts) from making any inquiries subsequent to the verdict.

We ask this court to assure defendants of the propriety of the court's supervision of juries by ruling that such conduct as the government conceded for the purpose of the hearing will require a new and better supervised trial.

## POINT II

THE GOVERNMENT'S CASE IS BARRED BY THE  
STATUTE OF LIMITATIONS. MOREOVER, THE  
LONG DELAY IN PROCEEDING TO AN INDICT-  
MENT PREJUDICED THE APPELLANT AND DENIED  
HIM DUE PROCESS OF LAW AND A FAIR TRIAL.

### A. The Government's Case, As Clearly Revealed at Trial, Was Barred by the Statute of Limitations

The proof at trial, taken most favorably to the Government, established that the conspiracy between the appellant, his uncle, Joseph Brasco, Doherty, Weiner and Masiello, terminated by the summer of 1968, and hence that the prosecution below was barred by the statute of limitations.

The proof shows that after Masiello received notice on May 31, 1968, that the A.N.R. contract was not being renewed, he never again looked to the Brascos, or to Doherty or Weiner, for any assistance in securing new contracts or leases from the Post Office. Instead, Masiello turned for assistance in his efforts to stay on at the Post Office -- not to Brasco -- but to his original group of cronies in the 34th Street branch of the New York Post Office. The proof further shows that Masiello, in fact, obtained the new Post Office lease for his Randen Co. through the 34th Street group, and not through any assistance sought from or given by Frank Brasco.

In short, there was a complete failure of proof that the conspiracy, "as contemplated in the agreement finally formulated", was still in existence on October 23, 1968 -- the last date within the statutory period -- and that at least one overt act "in furtherance of that conspiracy was performed after that date". Crunewald v. United States, 353 U.S. 391, 396 (1957).

The critical question in determining whether the statute has run "is the scope of the conspiratorial agreement, for it is that which determines both the duration of the conspiracy, and whether the act relied on as an overt act

may properly be regarded as in furtherance of the conspiracy". Grunewald, supra, 353 U.S. at 397. Or, as this Court stated in United States v. Borelli, 336 F2d 376, 384-385 (2d Cir., 1964), "the gist of the offense remains the agreement, and it is therefore essential to determine what kind of agreement or understanding existed as to each defendant".

The proof at trial showed that the conspiratorial agreement was at first directed only to rescinding the June, 1967 bids, so that A.N.R. could secure the contract. It was later expanded to include obtaining mileage reimbursement, the loan and the contract renewal. The objectives of the conspiracy had to be accomplished at the Departmental level in Washington through affirmative action by the appellant and Doherty, as Masiello could not obtain favorable action through his 34th Street contacts. Once the contract was rescinded, the conspiracy terminated, as there was no evidence establishing that the understanding between any of the parties was expanded to include a further understanding that Brasco, or the others, would now take action at the local post office level -- where the new bids would be approved -- to assist Masiello in gaining Post Office business for his other companies.

It must be recalled that Masiello had done business with the Post Office through various companies since 1956; that he had demonstrated ability to obtain leases at the local level through his 34th Street connections; and that he only looked for a higher level contact when he learned in 1967 that any favorable action to keep his post office business had to come from Washington, not from New York. (T 1127-1129) Before 1967, Masiello had obtained leases without help from Washington, even though he was not the lowest bidder and could not supply all of the trucks called for in the bid.<sup>\*/</sup>

<sup>\*/</sup> For example, he got the 1963 bid though he was third from the lowest bidder (T 1777-1781) and in 1964, though he was third from the lowest and could only supply 5 out of 25 trucks called for in the bid.

During his course of dealings with the Post Office prior to 1967 -- and thereafter -- Masiello bribed various officials at the 34th Street branch with intent to influence their official acts.\*/

Thus Masiello's corrupt dealings with the post office were an on-going thing -- antedating his meeting with Frank Brasco in 1967, and continuing after the A.N.R. contract was cancelled on May 31, 1968. But there is no proof in the record that Frank Brasco committed himself to whatever corrupt dealings with the post office Masiello continued to have after the A.N.R. contract was cancelled, or that Masiello ever sought to have Brasco do so. While there was proof that Masiello did continue to have corrupt dealings after the cancellation, there is no evidence that this continued activity was contemplated in the agreement finally formulated between Masiello and Brasco. Hence any acts proved as to Masiello's activities through his other companies, Randen and Tab, were not overt acts in furtherance of that conspiracy, but proof of a second independent conspiracy with which Frank Brasco had no connection. As in U.S. v Siebricht, 59 F2d 976,

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\*/ In USA v. Masiello, et al., 69 Cr. 417, Docket No. 34769, rem'd. in 434 F2d 33/ (2d Cir. 1970); aff'd. 445 F2d 1324 (2d Cir. 1971), a conspiracy and bribery case covering the period from April 1965 - May 1970, the Government proved that in May and November of 1966, Masiello paid hotel bills for Isidore Kihl, Superintendent of the Operations Unit; that in August, 1968, Masiello paid hotel bills for Maisto and Albanese, supervisors, administrative assistant and head dispatcher; that in 1966, in the spring of 1968 and in August of 1968, Masiello gave money to Andrew Daly; also liquor in 1966, TV sets in 1968, and a \$1,000. down payment on a car for Michael Di Masi -- all because they were the men running the motor vehicles operating unit at 34th St. (USA v. Masiello, Trial Transcript, pp. 170-172).

978 (2d Cir., 1932), "we have proof of two conspiracies, under an indictment alleging a single one and a conviction for both when the first was barred by the statutes of limitations ... (and where) the question of the guilt of the defendants for the first conspiracy could not be submitted to the jury when the cause of action on that conspiracy was barred by the statute of limitations". See also United States v. Russano, 257 F2d 712 (2d Cir., 1958); United States v. Reina, 242 F2d 302 (2d Cir., 1957)

From June 1967 to May 31, 1968, the Government proved a pattern of activity whereby the jury could find that Masiello sought out Brasco for help at the Departmental level in Washington to have the June, 1967 bids thrown out, so that Masiello could rebid through A.N.R. and obtain the contract. (T 3158-3180). The proof further showed that Doherty was able to use his position as a liaison officer in the Bureau of Facilities to accomplish this for Masiello. (See especially, T 424-425). In February, 1968, when Masiello found he was losing money on the contract, he testified that once again, he sought out Doherty and Brasco for assistance at the Departmental level in Washington on the mileage problem. (T 3187) Around this same time, Masiello needed financing for A.N.R. which he could not obtain in New York, and he testified he turned to Doherty and Brasco for assistance in getting a loan (T 3189-93). Then followed the scheme with Weiner to obtain the loan and a kickback, and in April, 1968, Masiello received a telegram from Weiner's company that the loan would be forthcoming. (T 3180-81).

Masiello testified that in early May of 1968, satisfied that he had obtained the contract for A.N.R., expecting its renewal, and also expecting favorable resolution of the mileage problem, he gave \$10,000. to Appellant's uncle, Joseph Brasco. (T 1728-29) Around May 24, 1968, Masiello received notification that the A.N.R. contract would be extended another year. (T 1206)

On May 27, 1968, Doherty learned the A.N.R. contract wouldn't be renewed and communicated this information to Brasco. (T 288) However, neither Doherty nor Brasco communicated this information to Masiello.

Masiello testified he only learned of the Government's decision on Friday, May 31, 1968, when two postal inspectors delivered the written notice to him at the A.N.R. office. (T 1216) Masiello said he called Joseph Brasco a few days later and asked him to find out why the contract was cancelled. (T 1219) Joe Brasco did not know anything about this and never called him back. (T 1758-59) Masiello learned the reason for the decision from Andrew Daly and Isidore Kihl (officials at the 34th St. Post Office in New York) (T 1218) After receiving notice, Masiello never called or saw Frank Brasco again (T 1243).

On May 28, 1968 -- four days before Masiello learned that the contract was not to be renewed and before Masiello had any reason to attempt to find out what, if anything, he could do to continue his work at the post office -- Doherty testified he met with Brasco to see what could be done about the situation. (T 291) Doherty said he told Brasco he would not take any further action through his contacts at the Bureau of Facilities -- the agency that had rescinded the 1967 bids -- and suggested that appellant see the General Counsel or Postmaster General. (T 291, 292-93) According to Doherty, Brasco asked whether an independent company, not connected to A.N.R., could take over the contract, and Doherty expressed the opinion that this might be possible. (T 292) Around this same time, Weiner learned that the A.N.R. contract was to be terminated, and called Doherty and Brasco, telling them he was upset, as the contract was essential to the loan. (T 1369-70) According to Weiner, they told him not to worry about the loan, as they were working on getting the

contract award through another company. (T 1369-70)

Timothy May, General Counsel to the Post Office in 1968, testified that on May 30 and May 31, 1968 -- again before Masiello knew that the A.N.R. contract was terminated -- Brasco called him to complain about the termination. May testified that when Brasco was informed the termination was because of Masiello's criminal background, Brasco told him he was concerned that if the contract was terminated, that A.N.R. would be unable to pay loans that innocent investors had made to the company. (T 632-633) Brasco also asked whether the contract could be transferred to other parties if they obtained ownership of the A.N.R. trucks, and May said that if this were done, the new owners would be eligible bidders. (T 634)\*/ This information was never imparted to Masiello.

Douglas Nobles testified that he spoke to Frank Brasco on June 11, 1968. His memory of the conversation was patchy and he only recalled that Brasco wanted to see the Postmaster General concerning various matters, including A.N.R.. (T 2914) Nobles recalled telling Brasco that the matter of the A.N.R. contract was settled and irrevocable and if he needed to discuss it further, he should see the Chief of the Bureau of Facilities. (T 2915) About a week before this, Nobles had gone to Brasco's office with Howard Cook and had told him at that time that the decision to terminate was final and would not be changed (T 2916) Nobles later wrote a memo to the Postmaster General stating that it was alright to see Brasco, as "the congressman has an attitude that is not difficult and he seems to understand the position of the department..." (T 2921. He also stated in the memo that Brasco understood the Department's reluctance to renew the A.N.R. contract and the congressman had not been pushing on the matter. (T 1034-35) Brasco met

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- Amos Coffman testified that after the May 31 cancellation May told him that Brasco asked whether the cancellation could be withdrawn if the criminal elements were divorced from the contractor's business. (T 2999) Doherty also testified that Brasco asked May whether another company, without the criminal element, could take over the contract. (T 559, 564)

with the Postmaster General on June 13, 1968. (T 2938)

Howard Cook, congressional liaison officer with the Bureau of Facilities, testified that sometime after April, 1968, Brasco asked him to check into the cancellation of a trucking contract with the post office. (T 2953) Cook later stopped by Brasco's office and told Brasco that the contract had been cancelled because of the notoriety of the management. (T 2954) Nobles was probably with him at that time. (T 2956) A week or two later, Brasco asked Cook whether the Department would reconsider if the management of the company was changed -- that it was Brasco's understanding that the management was prepared to step aside in favor of a former black F.B.I. agent. (T 2955) Cook said he would report that information back to the Department for further consideration. (T 2955) Cook did not get back to Brasco with respect to this and never communicated with Brasco again on the matter. (T 2955-56).

The proof taken most favorably to the Government, established that Brasco's actions -- between May 27, when he learned the A.N.R. contract was cancelled and mid-June when he spoke to Cook and the Postmaster General about A.N.R. -- were directed to determining whether the cancellation was final and irrevocable and whether the Department would reconsider the cancellation and permit the contract to be transferred to another management group, free of any criminal element. Brasco learned from all sources that the decision to cancel was final. Brasco had received some indication from May that the Bureau of Facilities might consider permitting another group, free of the criminal element, to take over the contract. But when Brasco made this same proposal to Cook, the new Congressional liaison man with that bureau, and asked him to see if the Bureau would reconsider the cancellation if new management were substituted, Cook never got back to him.

In order for Brasco to do anything further for Masiello after the May 31 cancellation,\* it was essential to have Cook's aid. Both Sullivan and Doherty -- who were the congressional liaison men with the Bureau of Facilities Brasco called upon throughout 1967 and early 1968 for assistance with A.N.R.'s problems and who were able to render the needed assistance -- were out of the Department. Cook had replaced Sullivan in April of 1968 (T 295) and Doherty resigned from Government service on June 15, 1968. (T 296)

When Cook showed no interest in convincing the bureau to salvage the contract for A.N.R. through Brasco's proposal to substitute new, untainted management for the criminal element, Brasco was unable to do anything further for Masiello.

Moreover, there was no evidence that Masiello requested Brasco to make the inquiries about rescinding the A.N.R. cancellation or transferring the A.N.R. contract to another company with independent management. There was also no evidence that Masiello was ever told or found out that Brasco spoke to May, Cook and the Postmaster General on A.N.R.'s behalf.

The Government had not charged any of the criminal acts committed between 1967 and June 11, 1968 as substantive crimes, with good reason: they were all time barred, as the indictment was not returned until October 23, 1973. In order for the single conspiracy count charged in the indictment to survive the statute, it was essential for the Government to maintain, and prove, that the conspiracy did not terminate in early June -- when Brasco learned that decision to cancel the A.N.R. contract was irrevocable and that Cook would not help convince the Bureau of Facilities to transfer the contract

\*/ Witnesses repeatedly used the word "cancelled" although the contract was never cancelled. It was not renewed.

to another management group free of the criminal element. The Government had to establish that the conspiracy did not terminate with the A.N.R. cancellation, but that after the cancellation occurred, Masiello and Brasco now agreed, explicitly or implicitly, to act in concert to obtain new Post Office contracts for other trucking companies owned by Masiello.

The Government did establish that a new bid solicitation was put out by the 34th Street Post Office in New York City on June 7, 1968, and that Masiello put in a bid through Randen Trucking Corporation on June 24, 1968. (T 1229-30) At the bid opening on June 27, 1968, Randen came out the lowest bidder. (T 1230-31)

However, Masiello's own testimony as to his activities after May 31, 1968, established that he never again looked to Brasco or his uncle for any assistance after the A.N.R. cancellation. It further establishes that Masiello obtained the June 24 bid for Randen, not through Brasco's help or even with Brasco's knowledge -- but through an entirely new, different and independent conspiracy with his old cronies in the Motor Vehicles Operations Unit of the 34th Street branch.

Masiello never attempted to get the A.N.R. contract cancellation rescinded by substituting a new A.N.R. management and divorcing himself from the trucking business -- i.e. by following the suggestion Brasco made to Cook and May. Instead, he obtained the bid for Randen by bribing the Motor Vehicles Operations Unit to overlook the fact that Randen was using A.N.R. trucks with the A.N.R. name barely painted over. This was the self-same conspiracy which the Government proved in 1970 in United States of America v. Masiello, et al.,

supra. \*/

The only communication between Masiello and Joe Brasco during this period was one phone call. Masiello admitted he made the call after the June 27 bids were opened, after he knew Randen had won the bid, and after he had Daly and Kihl to cover up the Randen -- A.N.R. connection. (T 1818) Masiello himself stated that the call was not a request for help:

- "Q. There was nothing left for Mr. Joseph Brasco to do, was there? A: That's right.  
Q. In other words, you didn't call him up for any help? You just called him up to let him know what was happening? A. That is right." (T 1818)

The Government's own proof established that Masiello got back into the 34th Street post office through his Randen bid without asking Joe Brasco or Frank Brasco for any assistance; without either of them knowing what he was doing in June of 1968, and without either of them taking any action to influence the June 27 award. Masiello won the bid by conspiring -- not with the Brascos -- but with a different set of government officials -- at the local, not the Departmental level -- to overlook the obvious connection between A.N.R. and

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In order for Randen to be in a position to win the bid, the Motor Vehicles Operations Unit, of which Kihl was in charge, had to recommend that the bidder was qualified. The unit had to inspect the equipment before making such a recommendation (Masiello trial record pp 280-281). Kihl and the others were bribed to overlook the obvious connection between Randen and A.N.R. and to recommend to Levitt, the official who approved the Randen bid (pp. 279-81) that Randen was qualified. Moreover, Kihl was the officer of Setmar Holding Corp., one of Masiello's corporations, which held stock in the Park Avenue garage. (T 1285-86). This gave Kihl yet another reason to cover up the Randen-A.N.R. connection.

34th Street not because of any continuing association with Brasco.  
with Randen through the efforts of the Motor Vehicles Operating Unit at  
as good evidence as any that Masello made it back into the bootleg business  
on the July 14th. (Masello trial testimony, p 388). This is properly  
new Buick for him in August, 1938, right after Randen had been accepted  
operations unit at 34th Street and Masello had paid \$1,000. down on a  
third transcript, p 182). He was employed in the Motor Vehicles  
at the son and said, "I don't stop leaving on the Masello car." (Masello  
1938", Masello read the letter cancelling the Randen lease, looked  
testified that in October, 1938, when he told Masello, "You lost the  
at the Masello bribery and conspiracy trial, one government witness

the trucks out." (L 1220, 1817-18, 1228-1230-2)  
the 14th and that they were able to help him by "the fact they didn't check  
as Masello himself admitted, he worked with the 34th Street people to get

the connivance of Kint, Daly, et al., that he was back in business at the  
Joe never gave him -- and to tell Joe, after the Randen bid was accepted through  
during May and July were for information on the May 31st cancellation -- which  
Frank Brasco after May 31, and, second, that the only calls to Joe Brasco  
was contradicted by Masello's own testimony first, that he did not call or see  
in Washington (L 52, 56) -- was not established through Masello, and, in fact,  
was able to get again in July of 1938 was through the efforts of Frank Brasco  
Vehicle Operating Unit. The government's theory -- that the only way Masello  
on his own activities in New York with the officials he corrupted in the Motor

The proof established that Masello got the Randen bid accepted strictly  
only to inform him, after the fact, of a fait accompli.  
before his bid was accepted, but was made after he knew he had the bid and  
tions. By his own admission, his call to Joe Brasco was not to ask for help  
bribery by running the A.M.R. trucks when they checked out the bid invita-  
the efforts of Kint, Daly and the rest in covering up his connection to  
called Joe after he had gotten favorable action from 34th Street through  
fraudulent scheme that he did not even tell Joe Brasco about it and only  
Randen. Indeed, so little did Masello need any help in executing this

to Joe Brasco.

connection, he could have made such a request for help when he spoke to Joe Brasco, or he could have asked Frank Brasco's assistance to conceal the A.M.B.-Linden A.M.B. occupied the same building. (L 1324-25) Certainly if Masello had been questioned by Postal Inspectors about the fact that Linden and Masello acknowledged that in July he knew that Linden officials had

of the collateral, not concerning themselves with contracts...." (L 1325).  
that even so, the only way to arrange a loan would be "strictly on the value of the collateral, not concerning themselves with contracts...." (L 1325).  
trying to get the contract awarded to other companies, and Weiner told him  
concerning the A.M.B. loan. (L 1326) Brasco mentioned they were  
one of May or beginning of June when he learned the A.M.B. contract had been

Weiner testified he spoke to Brasco in Washington by phone at the  
Masello-King conspiracy to obtain the June 27, bid for Linden.  
success with Linden but which do not show that Brasco had any role in the  
with Robert which amount to idle speculation about Masello's chances for  
loan for A.M.B. and to confirm that it was a dead letter; and two conversations  
had with his former associates was a June meeting with Weiner to relapse the  
conspiracy to obtain the A.M.B. contract terminated the only contact Brasco  
proved only the bare acts as to Brasco. It establishes that after the

The testimony by Weiner and Robert confirms that the Government  
venture and made it his own. United States v. Borelli, supra, 338 F.2d at 382.  
joined together with Masello after May 31, that he promoted Masello's Linden  
Government was left only with Robert and Weiner for proof that Brasco somehow  
on Brasco before that date every time he needed Brasco's assistance -- the  
asked Brasco for help after May 31 -- though he had no hesitancy in calling

Since it was obvious that Masello could give no testimony that he  
Post office.

on this same suggestion.

And even this possibility was gone when Cook failed to get back to Brasco

account of them. (See L. 1331)

It is clear that Brasco, because the prosecutor did not believe Weiner's  
directed Weiner not to mention other parts of this conversation Weiner  
the reduced amount, on his behalf. Moreover, the prosecutor below had  
is difficult to understand how Masello told Brasco to reject the loan, in  
was for information on the reason for the contract cancellation. Thus it  
may be that and that his one conversation with Joe Brasco during this period

It must be recalled that Masello testified he never spoke to Brasco after

other than tending to prove that Brasco was joining in a new effort with  
to but on the additional trucks necessary to perform under the contract. This  
would be unable to use the contract to get the million dollar financing he needed  
independent company through the Bureau of Facilities in Washington, Masello  
the postal contract. For even if Brasco could get the contract awarded to an  
on Masello's behalf to get an independent company substituted for A.M.B. on  
anything at all, it shows that Brasco had no reason to continue any efforts  
absolutely no value in obtaining the loan for Masello. It demonstrates  
substitution of companies for A.M.B. on the postal contract would be of

This testimony establishes that Weiner clearly told Brasco that a  
again after June, 1968. (L 1383-83)

reduced amount was unsatisfactory. (L 1335) Weiner never spoke to Brasco

According to Weiner, Brasco subsequently told him they felt the loan in the  
Brasco said he would speak with his client and get back to Weiner. (L 1334, 1335).

only way to get financing was with a reduced loan, based on collateral. (L 1333-34)

longer possible because Masello's interest would have to be disclosed and the

in time. Weiner told Brasco that even using other companies, the loan was no

According to Weiner, the loan was again discussed by him and Brasco sometime

trucks pursuant to the bid. (L 1532, 1538)  
Barden never had a contract with the Post Office, but merely supplied  
1937. (L 1103)  
Barden was not a newly formed company but had been in existence before

proof that Masello asked Brasco, directly or through his uncle, to make and  
obtained the bid through the efforts of him, et al. Once again, there is no  
to let or keep a postal contract. The conversation occurred after Masello had  
information about Barden and evidenced some curiosity about Barden's ability

At best, this evidence showed that Brasco had some (albeit incorrect)  
the chance was nil. (L 538)

Doherty said he told him if the company could be tied to Masello or A.M.B.,  
a contract or getting a contract with the Post Office was " " (L 538)  
Barden had been formed " " and "what did I think the chances of Barden keeping  
June 27. (L 1550) According to Doherty, Brasco told him "a company named  
Barden had already gotten the bid from the 3rd Street Post Office on  
1938. Doherty was out of the Government, having resigned on June 1st.

Doherty testified he saw Brasco in Annapolis sometime in July,  
had with Brasco -- one in July, 1938, and one on November 12, 1938.  
the contract award -- was that given by Doherty as to two conversations he  
that neither could not provide financing for Masello even if a new company got  
would not go to bid for A.M.B. with the Bureau of Facilities and learned  
the conspiracy did not terminate in June, 1938, -- when Brasco saw that Cook

The only other evidence offered by the Government to establish that  
down when neither told him that this would be impossible.

kick-back -- by substituting a new company on the A.M.B. contract was shot  
any notion Brasco may have had for salvaging the loan -- and his share of the  
Masello to obtain postal business under a new company, it instead proves that

aware of the "lack of integrity" of Randen (CX 34).

ment, the New York Postmaster in a letter to Randen, conceded that it was in any event, on October 23, 1968, five years to the day after the indict-

will assume that they did.

have credited Robert's testimony in the face of this proof, however, we see especially, L 5082-5103. It seems highly unlikely that any jury could there in the morning and returned that same evening with Judge Thompson. after the first of the year, except for one day - November 11, when he went witnesses Brasco proved that he was not in Washington from October 11 until Judge, that he was not present in Washington on November 12. Through these interactive assistant, and the testimony of a New York State Supreme Court Brasco proved, through his testimony, the testimony of his admission a meeting with Brasco in the Bottega restaurant in Washington. (L 288) because Robert had made and produced a diary entry for this date showing the government contended that the conversation occurred on November 12,

November 12, 1968, testified to by Robert.

the period not barred by the statute was a conversation with Brasco on that the conspiracy, at least as between Castellano and Brasco, continued into

The final piece of evidence produced by the government to prove

A. Birmingham, 337 F.2d 430, 432 (3d Cir., 1965).

assist Brasco and further with A.M.R. (see L 281, 282-83) United States former conspirators since Robert had told Brasco in May that he would not common object" rather than "mere conversation between conspirators" -- or nothing to show that "the declaration [was] an act in furtherance of the render assistance to Randen or any desire to do so. In short, there is a contract for Randen; or that, if he had, that Robert had any ability to inquiries concerning Randen or to take any action on his behalf in getting

the conspiracy, but withdrew this before it rested. (L 1886)  
of the conspiracy and used Berman incidents as overt acts connected with  
the government had initially charged that the Berman biddings were part

conversation. Instead, he mentioned the A.M.B. bid, which he had planned to make  
well as through his bid on TAB, he did not mention Berman to Joe Brasco in this  
to get back into the postal business through leasing his trucks to Berman as  
TAB or A.M.B. Moreover, even though Masello's testimony shows that he intended  
Masello that he called Joe Brasco to ask for help in getting the bid for  
leasing again". (L 1848) As with the July call, there is no testimony from  
in New York "just to let him know that I was going to bid on TAB and A.M.B.

Masello testified that sometime in November, he called Joe Brasco  
his own companies. (L 1807-1808)

Brodsky that he had ever made when he won the bids from the post office for  
for the bid, he had to admit that he made more money leasing his trucks to  
(L 1803-06). Although Masello disclaimed any intent to make sure Berman

to ensure that the bid through Brodsky's own independent efforts.  
and TAB the next highest. (L 1806)

bid through A.M.B. and a company named TAB, making A.M.B. the highest bidder

Masello spoke to Brodsky and told him what Masello was going to  
trucks to Berman if Brodsky could win the November bid. (L 1820)

he worked out an arrangement with Bert Brodsky, of Berman leasing, to supply  
(L 1838) He made no effort to call Frank or Joe Brasco for help. Instead

Masello learned of the Barker cancellation in October, 1938.  
to re-enter the post office through another company.

that Brasco had no connection at all with the scheme Masello was then employing  
about his own activities after the Barker lease was cancelled, it proves

When this conversation is put together with Masello's testimony

the statute.

This was the only phase of the alleged conspiracy which survived department to have independent management and control". (Indictment 8(c)). conspirator John A. Masello, but which would appear to the Post Office Office Department for other corporations which were in fact controlled by co-assisted co-conspirator John A. Masello in obtaining truck leases with the Post A. Brasco and Joseph Brasco corruptly and fraudulently arranged to assist and June 1, 1968, with knowledge of the A.M.B. cancellation, "the defendants, Frank

In its indictment, the Government charged that pertaining on or about equipment to Berlin when Brodsky came in low bid.

at all about Masello's plan to set up the bids with Brodsky and lease his alleged statement shows that Frank Brasco, like Joe Brasco, had no knowledge declaration as an act in furtherance of the common object. Moreover, this (L 333) Once again, under Birmingham, supra, it is impossible to view this under another outfit called LVB and what did Robert think the chances were. Brasco told him that the London thing didn't work and Masello had put in bids engagement in Pennsylvania. (L 332-33) Robert stated that at the luncheon, York City on the 12th, as he was leaving to take his family on a speaking the afternoon of November 14th (L 310). Brasco testified he was in New Judge Thompson testified that Brasco flew back to New York City with him on for lunch in the Botunda Restaurant in Washington, D. C. (L 338-300; 338)

Robert testified that on November 12, 1968, he met Frank Brasco Office business through Berlin after the London cancellation. was not even a full disclosure of Masello's November scheme to regain Post Brasco, that it was not an act in furtherance of any conspiracy because it the highest of the three. It is clear from the content of the call to Joe



case at bar for example, Congressman Brasco by virtue of his hectic schedules and important documents, had been lost and destroyed. (T #83, T#88) In the regarding conversations, meetings and phone calls, had also all but faded forever to the defendant by Government delay and inaction. Recollections witnesses, and the one who could clearly put the lie in Doherty's mouth was lost ended right there and then Sullivan died and nobody can ask him". Thus the major counsel in his summation Doherty talked to Sullivan. "The whole case could have shortly before the defendant's indictment. As aptly observed by defense investigators never spoke to Sullivan although his death did not occur until September, 1973, of Sullivan is underscored by the very fact that it was undisputed that Government

The prejudice to the defendant's case caused by the unavailability Masello and Doherty, and Weiner, had died.

Ferraro, and Mr. Fitzell, who were in a position to refute the testimony of Basilio of these many years key witnesses such as Michael Sullivan, Ralph of 1974 for acts alleged to have been committed in 1967 and 1968. During the the appellant. Frank Brasco was indicted in October of 1973 and tried in June investigating the incident in filing an indictment substantially prejudiced

The Government's actions in delaying for almost four years after New York.

An indictment was handed up on October 23, 1973 in the Southern District of by F.B.I. agents in 1970, no further action was taken by the Government until Division in Washington in 1968 and 1970, and the appellant was interviewed the U.S. Attorney's office in Baltimore and the Justice Department Criminal

Although the subject matter of the case at bar was investigated by

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so as to deny him due process of law and a fair trial

B. The long delay in proceeding to an indictment prejudiced the appellant

Diastello, L 1020; Porter, L 5015)

Porter, L 1013, 220, 203; Ray, L 0111-0118, 022; Salvan, L 038;

constructed their cases on their review of available documents. (See  
had no independent recollection of events, but had attempted to re-  
witnesses for the Government also acknowledged that very often they

appellant's refusal to make his statement a sworn statement.

See Point A, dealing with the fifth amendment and evidence of

State, 3418). The prosecution also repeatedly referred to telephone calls  
from 1967 to 1968 to early 1968. (L 5315-5316, 5318, C. E. 20, 3430-3441,  
the F.B.I. statement had changed the dates of his first contact with A.M.B.  
recall the exact date. Reference was also made to the fact that Brasco in  
Diastello in June of 1967, when at the second trial he indicated he could not  
starting at the first trial to the best of his recollection that he first met  
information. For example, Brasco was attacked by the prosecution for  
the jury that he was deliberately attempting to evade questions and conceal  
and a inability to recall exact dates and conversations and made it appear to  
rebuttal witnesses the prosecution, however, adroitly exploited the Congress-  
review of these items. (L 5535, 5422) During cross-examination and through  
effort to refresh his recollection and that his testimony was based upon a  
of recollection had caused him to go over documents and phone records in an  
ago to the jury (L 5552-5558). The Congressman acknowledged that his lack  
his lack of recollection of events which occurred some six and seven years  
regarding his testimony on the charges in question, and he clearly indicated  
not remember or recall exact dates or substances of conversations and meetings  
as Congressman (his office handled some 500 inquiries a week) naturally could

in connection with the preparation of the case, but it was not so available. The postal records which were sought and an inspection of which was granted. The Noble's memorandum should have been available to the defense as part of

Further, during the trial, the 1987 telephone records of Robertly "Inconsistencies made a liar out of Frank Brasco". (L 355H) eyes of the jury. The prosecutor in fact, argued in his summation that the testimony could not help but severely damage the defendant's credibility in the (L 3313, 3330, 3331, 3332, 3333), the seeming inconsistency in the defendant's while Brasco was testifying, and still had no independent recollection of it the alleged meeting of June 11, 1988 until Nobles discovered an office memorandum question and where, in fact, Douglas Nobles and Howard Cook had forgotten about understandable in light of the long lapse of time with respect to the events in A.M.B. in an off-hand manner at a meeting with them in early June, is perfectly of conversations with Nobles or Cook, and the fact that he may have discussed 3322) through the failure of Congressman Brasco to recall the specific dates Brasco stated he had ordered a hands-off attitude from his staff. (L 3313, discussed the A.M.B. situation with them in June of 1988, some days after through the testimony of Nobles and Cook, indicated that Brasco had (L 3331-3332, 3333) During the government's rebuttal, the prosecution, to both men he was unable to specifically recall the exact time or date. officials, regarding A.M.B. Although Brasco acknowledged that he spoke recall any conversations with Howard Cook or Douglas Nobles, two postal Mastello's background, Brasco was also unable during cross-examination to on behalf of A.M.B. after May 31, 1988, the date that he was apprised of dealing with Brasco's testimony as to whether he had taken any further action occurred (L 3338, 3343, 3347, 3348, 3349). In a key point of the trial, to recall the substance of these calls and conversations or that they in fact and conversations which allegedly took place and attacked Brasco's failure

E. Supp. 3d (D.C.N.Y. 1925 ): 55 C.L.S., Section 534, p. 212.

construed then liberally in favor of defendants. <sup>original law</sup> United States v. Satz, 109  
Courts, keeping in mind the aim of statutes of limitations, have consistently

beyond availability 55 C.L.S. 2 533 p. 214."  
of accused have by sheer lapse of time passed  
messes and proof necessary to the protection  
of Government to explode only after wit-  
allowed to ferment endlessly in the files  
theory that prosecutions should not be  
"such statutes are founded on the liberal

the reasons for barring state claims states:

States v. Satz, 424 F.2d 202 (1st Cir., 1970). Corpus Juris Secundum in discussing

non U.S. 307; United States v. Scully, 412 F.2d 880 (2d Cir., 1969); United

see also United States v. Ewell, 383 U.S. 116, 122; United States v. Norton,

punishment because of acts in the distant past."  
ing of time and to minimize danger of official  
when basic facts may have become obscured by pass-  
from having to defend themselves against charges  
"This section is designed to protect individuals

of delayed prosecutions:

officially stated (in the context of the statute of limitations) a major evil  
United States Supreme Court in Louise v. United States, 397 U.S. 112, spec-  
statute of limitations and the Norton rule were designed to prevent. The  
a situation which they created. This was the very circumstance which the  
in this position then attempted to impute sinister motives and will from  
alleged meetings and phone calls. The Government who placed the defendant  
and documents and in being unable to recollect the dates and contents of  
by Governmental action of being unable to have access to important witnesses

In the case at bar, the defendant was thus placed in a position  
destroyed. (See EX 38-A; J #08-#10)

recorded by the United States Attorney's office from Maryland had been  
were unavailable and tape recordings of Doherty's statement allegedly

current opinion on the Knight v. United States, 338 U.S. 400 (1950) and  
an overt act of one co-conspirator binds all. Mr. Justice Jackson in his con-  
currence are especially prejudicial to the defendant because of the doctrine that  
in conspiracy cases in particular, delays in the prosecution of  
see also United States v. Glavin, 327 U.S. 134 (1946).

which becomes subject.  
of the proceeding for the purposes of determining  
because if any of the events occur the responsibility  
Boyd v. U.S., 343 U.S. 500 (D.C. Cir. 1952),  
Government or defense witness is prejudiced,  
321 U.S. 833, it is the present recollection of the  
of the day of the offense, see Jackson v. U.S.  
is unable clearly to reconstruct the events  
(D.M.) aff'd, 320 U.S. 828, it is the defendant  
lost. See petition of Proctor, 13 F.R.D. 183 303  
key defense witness or valuable evidence is  
831, 833 (1952): such a claim may arise if a  
delay in arrest. See Jackson v. U.S., 321 U.S.  
is a biasable claim of prejudice from the  
for this reason we must inquire whether there

343 U.S. 184: Chapman v. U.S., 376 U.S. 102.  
Johnson, 338 U.S. 808: U.S. v. Dickerson,  
upon the speedy trial guarantee, U.S. v.  
102, 103) or a sixth amendment claim based  
fifth amendment (Bowling v. U.S., 325 U.S.  
may raise a due process claim under the  
case his defense and if so such prejudice  
impairs the capacity of the accused to pre-  
it may well be that pre-arrest delay may  
although prejudice is not to be presumed

stated at page 82:

Government delay, would warrant a dismissal of the indictment. This Court  
prejudice such as a loss of key witnesses or evidence caused by unnecessary  
383 U.S. 80 (1966) cert. denied 383 U.S. 1044, similarly indicated that actual  
violation of the statute of limitations. This Court, in United States v. Feinberg,  
arising by the Government's delay. Thus, the Court held, could occur pres-  
of law and a fair trial where a defendant could demonstrate actual prejudice  
possible applicability of the fifth and sixth amendment, rights to due process  
in United States v. Burton, the Supreme Court even indicated the

which during the trial submitted to the jury.

notions, and the issue of the statute of limitations was specifically

the issue of prejudicial delay was raised by the defense in its pretrial

and. Indeed, by this appellate court is clearly called for.

very concept of a fair trial are challenged by the occurrences in the case at

the fundamental principles of our system of criminal justice and the

to save the substantive count of conspiracy, which was barred by the statute.

that this indictment containing only one conspiracy count, represents an attempt

further, the fact that a substantive crime is not charged, indicates  
counts.

it consists of a conspiracy count only, a crime that involves an intangible

is it true that the lapse of time prejudiced the defendant in this case, because

appellant brought about by inexcusable governmental action. Particularly

the case at bar represents a classic example of prejudice to the

what Krametsch warned.

attempting to open floodgates against

the bar of the three year statute is

situation where the government faced by

we have before us a typical example of a

sweeping nets of conspiracy prosecutions.

proceed the already pervasive and wide

"Courts view with disfavor attempts to

through the conspiracy device. The court stated:

court limited the government's attempt to evade the statute of limitations

In Conway v. United States, 323 U.S. 381 (1945) the Supreme

limit of its logic."

dency of a principle to expand itself to the

offense. Its history exemplifies the ten-

that elastic sprawling and pervasive

characteristic of the long evolution of

needs some further comment because it is

the federal law of conspiracy which war-

"this case illustrates a present drift in

At 91. Mr. Justice Jackson stated:

pointed out the danger of conspiracy prosecution for individual liberty.

### POINT III

THE EVIDENCE FAILED TO PROVE APPELLANT  
FRANK J. BRASCO GUILTY OF CRIMINAL  
CONSPIRACY. THE CASE AGAINST HIM WAS  
A CHIMERA.

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Seventeen persons from all walks of life who had known Congressman Brasco for many years testified to his good character and his reputation for honesty, veracity and truthfulness. The Congressman himself testified in detail that his contact with Masiello and A.N.R. came about as a result of a complaint by Masiello to him regarding his treatment by the Post Office Department and his office merely processed the complaint, as part of the routine work of his congressional office. As soon as he learned from post office officials about Masiello's criminal background, Brasco ordered a hands-off policy, and this was confirmed by two of his employees (T 1971-1977, 2136). Brasco denied any involvement whatever in a conspiracy to defraud the government or to obtain any personal fees for himself, a position he steadfastly adhered to even while being sentenced. (T 404)

The government's case on the other hand rested on the testimony of three acknowledged criminals and liars, all of whom had been granted by the government, immunity, favors, and leniency, in return for their testimony accusing Congressman Brasco. Doherty in fact stated that in his conversation with the United States Attorney's office, he was specifically told that they wanted him to implicate a Congressman and he was given Brasco's name among others. (T 345) Masiello, in his testimony, stated that in his conversations with Frank Brasco he never told him of his involvement in criminal activities and in fact stated that he presented himself to the Congressman as a substantial businessman. (T 1139, 1663, 1707, 1871) Masiello further acknowledged that after making his initial inquiry to the Congressman's office he thereafter called Joe Doherty whenever he had a problem or question. (T 1634-1636) Masiello also stated that he had never

arranged for any money to go to Frank Brasco and never complained to the congressman that he gave anyone \$10,000. (T 1726, 1738) The numerous inconsistencies in the testimony of the three prosecution witnesses and the ludicrous nature of the government's case is highlighted by the fact that with respect to the alleged \$10,000. given by Masiello, Masiello specifically stated that he gave the money to Joe Brasco in May of 1968 while Doherty stated that Sullivan gave him his share of \$2,000. in November of 1967. Wiener on the other hand could not even state the amount of the alleged bribe indicating he thought \$20,000. -- had been given. (T 1577-1583) The claim of a number of alleged meetings involving Masiello, Doherty and Wiener with Congressman Brasco is specifically challenged by the inability of the prosecution witnesses to state with accuracy the surroundings of the premises where the alleged meetings were held and by the defense's specific evidence that no such meetings were or could have been held. Masiello, for example, was unable to testify as to distinct objects and paintings in Congressman Brasco's Washington office (T 1677-1679), and Doherty when stating that he observed Mrs. Brasco's paintings in the Brasco's Brooklyn home was specifically refuted by the fact that the Brascos had recently moved into that house and no such paintings had been hung at the time of the alleged meeting. Further with respect to the meeting at the Congressman's law office, several witnesses who occupied that office stated that they never observed such a meeting or recalled ever seeing Joseph Wiener, a man of 300 lbs. who could not be easily forgotten. (T 194, 1964, 2078, 2139)

With respect to the alleged April 8th, 1968 meeting, Doherty was unable to produce any vouchers indicating a trip to New York although it was established that his frugal nature caused him to file vouchers for government reimbursement of expenses even to the tune of a 50¢ taxi tip for a trip where he was on personal political business. (T 278, 481) Brasco on the other hand stated that on April 8th he was in and out of the office and had met with Jefferson High School students to discuss the death of Martin Luther King, Jr. (T 2805)

Doherty also testified that in July of 1968 he had discussed Randen with Brasco at the Annapolis meeting and in his description of that meeting he stated that Randen had been referred to as a new company. Randen in fact as revealed by Masiello on testifving was in operation for several years, having been incorporated in 1965. This discrepancy also brings sharply into question Doherty's credibility (T 298, 1256).

Finally Doherty's testimony that he met Brasco at the Potunda Restaurant on November 15, 1968 was specifically refuted by testimonial and documentary evidence. Judge Thompson stated that he returned to New York with Brasco on November 14th, 1968 and both Brasco and his secretary testified that the Congressman immediately left thereafter with his family for Pennsylvania where he attended a convention. The airline ticket showing Brasco returned to New York and a brochure indicating Brasco's presence at the convention as a speaker firmly established the falsity of Doherty's claim (T 2095-2100, 2127, 2130).

In addition Postal officials who testified stated that Congressman Brasco never contacted them regarding a renewal letter for A.N.R. (T 2113), and that no one even suggested to them which decision to reach regarding A.N.R. nor was any money given to them. In fact the decision to invalidate the June 1967 bid was based upon a legal opinion that the procedure had been invalid and all bidders were allowed to resubmit their bids. It was, in fact, established that the eventual disqualification of E.G. Maintenance (Lehigh) was entirely proper since the company failed to obtain the proper SBA certification as competent to perform (T 170, 198, 644).

The government thus after filing a nine page indictment failed to prove during the course of a three week trial that Brasco was guilty of any illegal activity. Analysis of the evidence as indicated above demonstrates that the case against the Congressman was illusory not real. Even accepting Doherty's

testimony one looks in vain for any testimony of any agreement on the part of Frank Brasco in words or substance to engage in any bid rigging or to accept any money.

Doherty's position in the post office was that of an executive assistant to the Assistant Postmaster General in the Bureau of Facilities. Neither de facto nor de jure did Doherty's role involve any decision making whatsoever concerning which firm did or did not get postal contracts. He was strictly in liaison work and any problem on behalf of a New York City based company would have to be taken up with the appropriate decision makers in the Post Office Department. Procurement decision making<sup>in</sup> the department occurred at several different levels, to wit, at a national level, a regional level, and a New York City level, and the key persons involved in the decision making process over procurement included Mr. Brewer, Mr. Cahill, Mr. Strachan and Mr. DiLorenzo (T 168, 642). Neither Brewer, Cahill, Strachan or DiLorenzo was named in the indictment as<sup>a</sup> defendant or co-conspirator, and none of these officials who made the 1967 decisions which lead to A.N.R.'s getting the contract in 1968, testified to a single impropriety or act of misbehavior on his part in the granting of the 1968 contract to A.N.R. On the contrary, testimony and the exhibits reflect that the actions of the postal decision makers were taken in the regular course of the ordinary activities of the Post Office Department (T 417, 422).

Moreover, even when the Randen bid was cancelled because the A.N.R.-Randen connection had surfaced, the post office still continued to use Masiello's trucks in an entirely open manner. In the letter of cancellation to Randen of October 23, Postmaster Strachan expressly states "we desire, however, to continue to hire your tractors on an emergency basis until an award is made." (GX 24). And in December, when Masiello was leasing his trucks to Bermur Corp. which in turn had gotten the post office bid award, once again, when the Bermur trucks

were involved in accidents, Strachan openly sent Masiello a copy of a letter to Bermur regarding damage to the trucks. Strachan's letter again openly acknowledges that the post office was aware of Masiello's connection to Bermur Leasing and that Masiello had a potential justifiable legal claim for damages to the trucks (Def. X A-1-2).

Further the evidence in the record fails to show that Brasco had any knowledge whatsoever of Masiello's criminal background. On its face, the thought that Masiello would come down to Washington and tell a thirty-three year old, green freshman congressman that he was a member of the Genovese family with a long criminal record is palpably ridiculous. Masiello, in fact, testified that he never told Brasco about his criminal background but instead portrayed himself as a respectable businessman (T 1139, 1663, 1707, 1871).

No doubt the government realized the absurdity of such a contention, and it tried to permeate the record with innuendos concerning newspaper articles and publicly disclosed investigations over the course of the years that had involved Mr. Masiello (T 202, 274, 631-632, 2627-2630). The fact is, however, that there certainly would have been no reason for Congressman Brasco to have read or heard of any article or report concerning Mr. Masiello, particularly one reported in the press back in 1959 or 1964, or thereabouts, and in any event no reason for Mr. Brasco in 1967 to have related what might have been said or seen years earlier to a successful trucker who came to his office years later. The fact is that several government agencies, including the Post Office Department, had dealt with Mr. Masiello and with his companies for years. He had been doing work for the Post Office Department in connection with East Coast Trucking Corp. and Atlantic Coast Trucking Corp. since 1959. Moreover, during the intervening years, he had taken perhaps a million dollars in loans from the Small Business Administration (T 1257, 1264-1267, 2333-2336). Presumably, the

officials of the SBA and the Post Office Department in both New York and Washington, had themselves from time to time over the years read the New York Daily News, and had themselves kept up on their current events, yet clearly there is no more reason to believe that these public officials were involved in a conspiracy concerning Masiello's criminal record, anymore than Mr. Brasco was so involved.

The government had to supplement the innuendos, and to do so Mr. Doherty presented, along with his other testimony, some veiled allusion to a supposed remark by Mr. Brasco that Mr. Doherty had better watch himself in his dealings with Mr. Masiello and his associates, because they were pretty rough characters (T 264). When all is said and done, however, a retrospective viewing of the record makes it perfectly clear that Congressman Brasco knew nothing of Masiello's criminal past.

Furthermore, in contemplation of law, A.N.R. Truck Leasing Corp. was a separate legal entity from John Masiello. It was perfectly proper for the firm to do business with the government in terms of its corporate status. It does not constitute a crime for individuals to create and employ business entities in a self-serving way, where no fraud is involved. In the case at bar while claiming that the government was defrauded the evidence as outlined by the government witnesses showed that A.N.R. had, in fact, lost money on the contracts and that A.N.R.'s service was in all respects satisfactory (T 1185, 1275, 1280, 1727).

There appeared to have been no postal procurement regulations for bidding postal contracts which barred the letting of contracts to corporations with owners, managers, or "dummies", having criminal records. The bidding paper work submitted by postal contract applicants did not even contain a

category where one could state whether a company's component members did or did not have criminal records. Although a prospective contractee had to have "integrity", there was no specific item dealing with criminal records as such.

Although the indictment states and is explicitly premised upon the assertion that the Post Office Department "cancelled" the contract with A.N.R., that is plainly false. The exhibits in evidence and the testimony established conclusively that the decision makers consciously withdrew their cancellation notice to A.N.R. before it was sent, and in lieu thereof substituted a non-renewal notice (CX 18, T 654, 655). They feared -- as the exhibits make clear -- that they would open themselves to a lawsuit if they cancelled the A.N.R. contract. When a similar occurrence arose with Randen they sued the Post Office.\*/  
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Record evidence is also lacking that Congressman Brasco conspired for the improper payment or receipt of money. Masiello failed to testify to any understanding concerning the payment of money to Congressman Brasco. Upon this appeal it is to Frank J. Brasco's agreement, if any, as manifested by the record that we look to, and not to the words and declarations of agreement of any other accused. In law, the "sons" are not tainted by the "sins of the fathers", let alone by the alleged sins of the uncles. Whatever understanding Masiello may or may not have had with Joseph Brasco, we rely upon the lack of record evidence, direct or circumstantial, concerning any understanding on Frank J. Brasco's part respecting money.

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\*/ See Randen v John R. Strachan, file number 68 Civil 4233, S.D.N.Y.

Moreover, the lack of any imputation of agreement on Congressman Brasco's part concerning money in the testimony of Doherty, is devastatingly probative on Mr. Brasco's part. Doherty portrays himself in his testimony as a confidant of Mr. Brasco's and as having been involved in meetings, phone calls and frequent contacts with the congressman during the period of the alleged conspiracy. Doherty was in effect a salesman selling to others the image of his close association with Congressman Brasco. When finally caught in the web of his own illegal acts he continued his recognized pattern by then attempting to "sell" the congressman himself. Even Doherty's testimony, however, amounted to no more than a claim that a fellow postal employee, one Michael Sullivan, since deceased, gave him, Doherty, money and said that it was from Joseph Brasco. Masiello also testified to the alleged payment of money to Joseph Brasco, but as to FRANK J. BRASCO, the record is strikingly bereft of evidence of an agreement on his part concerning the payment of money.

The government knew full well that, that fact, unless it could be somehow overcome, was the death knell of its empty house of cards. Nor would mere prosecutorial rhetoric designed for a jury concerning "an eighteen-month saga of corruption", fill the gap. Without money, the case remained that same sterile conspiracy that it had been evaluated to be back in 1970 when Henry Peterson of the Department of Justice decided that the case against Congressman Brasco should be abandoned without an indictment after an investigation by the Baltimore United States Attorney's office (T 549; Def. X 1 in support of sequestration motion).

To try to plug this hole in the case, the government introduced strawman evidence of an alleged finder's fee, a claimed internal understanding between Frank J. Brasco, Joseph P. Doherty, and Doherty's friend, Joseph Wiener, to help Brasco raise some funds in the form of a finder's fee for him from Masiello's loan. The claim was that the finder's fee was to be kept secret

from Masiello (T 1343-44). The problem with the government's attempt to plug the hole in its case was that even if Congressman Brasco had been involved in a deal with Doherty and Wiener to raise money for Masiello and spin off a finder's fee for Brasco in the process, that would not constitute a criminal agreement. As Judge Cannella charged the jury, even a congressman can engage in outside activities. We know of no rule forbidding the payment of a finder's fee in connection with a private financing arrangement. Even if such a finder's fee was to be kept secret from Masiello, at worst that might be thought of as "victimizing" Masiello, but surely neither the government nor the public.

The fact is that the so-called internal conspiracy was no part of any legitimate case against Frank J. Brasco that should have been submitted to any jury. It was manifestly never a part of the conspiracy case.

In ordinary custom and usage, finder's fee are a customary part of business and commercial dealings, and although some people do not consider them to be pristine, they hardly constitute the basis of a criminal agreement. We submit that what this case against Congressman Brasco came down to, however, was the endeavor of the prosecution to use the conspiracy statute to wage a private revolution and carry out a private agenda for social change. Although Congress may have the power to effect a revolution prospectively, appellant submits that it is intolerable for a federal prosecutor to do so retroactively. To do so six years after the critical events, would be ex post facto.

In United States v. Archer, 486 F2d 670 (2d Cir. 1973), this court held that federal jurisdiction had been improperly invoked in that there was an insufficient interstate basis to confer federal jurisdiction. This court held, more specifically, that federal jurisdiction had been manufactured. We submit

that jurisdiction has likewise been manufactured in the instant case, only in a different way than was dealt with in the Archer case. Viewing the record as a whole and accepting all reasonable debates as having been resolved in favor of the government, appellant respectfully submits that the behavior ascribed to Congressman Brasco, simply stated, does not constitute a crime. Furthermore, the mere fact that the verbose indictment was couched in the customary language and style of a conspiracy case, does not a conspiracy make. Of course, the trial jury had no way of knowing this. Brasco claimed that there was one meeting between himself and Masiello. The government claimed four meetings. Rule 29 motions by appellant were denied, and the disputed questions of fact were submitted to the jury. One can hardly blame the jury for concluding, as it obviously did, that the verdict of guilty had to follow upon a finding that the facts were as the government alleged them, rather than as the defense alleged them. But whether there were four meetings or one meeting, does not create a crime where misbehavior of any sort is otherwise lacking.

Congressman Brasco disputes, disputed, and attempted before the jury to repel the inferences offered against him by such testimony as the fact that he would not take an oath and give testimony to the F.B.I. agents. The jury apparently rejected the truth or accuracy of some at least of Mr. Brasco's testimony particularly in light of the court's charge, including the rule given to the jury that they could consider portions of Brasco's trial testimony as "consciousness of guilt" (A 38). However, even if the jury resolved important factual disputes in favor of the government, this cannot effect the manufacture of criminal liability in the absence of some misbehavior on the part of the accused.

It must be borne in mind that the case at bar involves a conviction for criminal conspiracy, a crime recognized as being so nebulous and vague as to have been described by Justice Jackson in Krulewitch v. United States, 336 U.S. 440, as "almost defying definition." It is a crime which is extremely

difficult to defend against and where juries will convict upon the slightest evidence.<sup>\*/</sup> It has thus been aptly termed by legal scholars including the distinguished Judge Learned Hand as the "prosecutor's darling",<sup>\*\*/</sup> and many, including several of our appellate courts, have viewed its application with caution and disfavor as posing unique threats to individual freedom and human liberty.<sup>\*\*\*/</sup> The dangers to an innocent accused from the utilization of the conspiracy theory by an overzealous prosecutor is no where more graphically portrayed than in the circumstances surrounding the case at bar.

To prevail in a criminal prosecution it is firmly established that the government is required to prove the defendant's guilt beyond a reasonable doubt. Crawford v. United States, 375 F2d 332 (1967); United States v. Johnson, 371 F2d 800; United States v. McKemie, 301 F2d 880; United States v. Casey, 428 F2d 229; and the trial judge must grant a directed verdict of acquittal if this standard is not met. United States v. Taylor, 464 F2d 240 (2d Cir., 1972) From an examination of all the evidence in the case at bar it is clear that the government failed to meet the required standard of proof and, in fact, the record fails to reveal any misbehavior cognizable in law upon Congressman Brasco's behalf.

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<sup>\*/</sup> Mr. Justice Jackson's opinion, Krulewitch v. United States, 336 U.S. 440.

<sup>\*\*/</sup> Judge Learned Hand in Harrison v. United States, 7 F2d 259, 263 (2d Cir. 1925); 34 Brooklyn L.R. 1, 1957.

<sup>\*\*\*/</sup> Grunevald v. United States, 353 U.S. 391 (1957); Clarence Darrow, The Story of My Life, pg. 64, 1934; Conference of Senior Circuit Judges as reported in Annual Report of the Attorney General (1925), pp. 5-6.

POINT IV

THE APPELLANT WAS DEPRIVED OF HIS SIXTH AMENDMENT  
RIGHT TO CONFRONT HIS ACCUSERS WHEN A PRINCIPAL  
GOVERNMENT WITNESS, GRANTED FULL IMMUNITY, WILFULLY  
AND CONTUMACIOUSLY REFUSED TO COME INTO COURT AND  
TESTIFY FROM THE WITNESS STAND AND HIS PRIOR TESTI-  
MONY WAS READ INTO THE RECORD, OVER DEFENSE OBJECTION.

John Masiello, a principal government witness against appellant, refused to testify at the trial below, although he had been granted full immunity. Once Masiello declared himself in contempt, his testimony from the first trial was read into the record, over defense objection that Masiello was not an "unavailable" witness (T 1034 ). A motion for a new trial was made on this same ground, based on information obtained after verdict, from the July 22 and 26 proceedings wherein Masiello was sentenced for the contempt.

The reason Masiello gave for the contempt was that he feared for his wife's health were he to testify. She was an unstable woman, who had threatened suicide on a number of occasions, and who did not want him to take the stand.

At the first trial, Masiello had testified as a government witness, despite his wife's mental condition and her reluctance to have him testify. He had demonstrated no reluctance to take the stand at that time, even though Mrs. Masiello actually attempted suicide on February 10, one day before he was brought down on a writ ad testificandum from Danbury Prison. Despite his wife's attempt to kill herself, Mr. Masiello was in there - - a willing witness for the Government - - when the first trial began on February 19th.

Masiello's disregard for his wife's hysterical condition the first time around possibly stemmed from the fact that Masiello asked for - - and hopefully expected - - help from the Government in obtaining early release on parole in return for his cooperation. (T 1622, 1639-1641).

Masiello's seven year prison sentences on a conspiracy and bribery conviction and a conviction for false statements to the draft board, originally imposed with fixed minimum terms, had been changed to sentences under 18 U.S.C. Section 4208 (a) (2), where parole can be granted at any time in the discretion of the Parole Board. As a result of his testimony at the first trial, the Government granted him immunity from prosecution in this case and sent a letter to the Parole Board on his behalf (T 1624). Masiello's attorney made application to the Parole Board in March of 1974, based in part upon his cooperation with the Government in the February trial (Contempt Sent. Min. p.5).

Additionally, Masiello pleaded guilty to extortion in the Eastern District in September of 1973, and received a concurrent sentence under Section 4208 (2). On April 19, 1974, when Masiello was sentenced in the District of Connecticut on another crime, he received a one year concurrent sentence, again under Section 4208 (a) (2), with the court specifically authorizing Masiello's attorney to tell the Parole Board it did not wish that sentence to interfere with Mr. Masiello's parole possibilities (Contempt Sent. Min. p.6).

Masiello was also able to set the limits on what he would and would not do for the government to secure the consideration. He refused to cooperate in all other cases where the government was eager to obtain information from him, and was able to limit his cooperation only to this case (T 1649, 1854).

Having secured substantial benefits by testifying at the first trial, Masiello then became a contumacious witness at the second.

He did not want to take the witness stand this time, out of his great concern for his wife - - whom he attempted to divorce in 1970 by swearing falsely to a Nevada residence to give the court jurisdiction (T 1824), and whom he continually two-timed, having had a long time liaison with another woman, the

mother of his ten-year-old child, whom he continued to see as often as he saw his wife.<sup>\*/</sup> Although Masiello had no compunction about taking the stand at the first trial, only nine days after his wife's suicide attempt, his concern for Mrs. Masiello was so great four months later that he refused to go on the witness stand and face the second jury.

The trial court and the Government accepted Masiello's excuse at face value, over defense objection that Masiello had gotten a "good deal" from the Government in return for his testimony, and if he was able to avoid testifying without being hurt, he "comes off well on both sides of the fence" as he could now tell "his people" he was no longer a stool pigeon (T 1035-1036).

The trial court ruled that Masiello's wilful refusal to testify rendered him an "unavailable" witness, relying upon Tenth Circuit cases to this effect (A 19-25).

We submit that the Tenth Circuit cases embody a doctrine which is detrimental to the sound administration of justice and that this Court should refuse to adopt their holding.<sup>\*\*/</sup>

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<sup>\*/</sup> During Masiello's cooperation in this case, the United States Attorney's office arranged for him to visit his mistress whenever he visited his wife (T 1637-1638).

<sup>\*\*/</sup> Nor is the presence of a contempt exception in the Proposed Federal Rules of Evidence, Rule 804 (a) (2) sufficient reason to embrace the exception. In United States v. Cunningham, 446 F2d 194 (2d Cir. 1971), the Court specifically stated that the guide is not the Proposed Rules and refused to adopt a hearsay exception, which the rules permitted, but which the Court deemed unwise. Subsequently, the proposed rule in question was amended to conform to the Second Circuit position. See United States v. Allsup, 485 F2d 287 (8th Cir. 1973).

We believe that no witness who contumaciously refuses to testify should be permitted to control the course of a criminal trial and to determine that his own unjustified convenience in not taking the stand overrides and nullifies - - not only a defendant's Sixth Amendment right to confront his accusers - - but the well-established principle that "the public has a right to every man's evidence." Government Brief to the Supreme Court, p 8, United States v. Wilson, 73-1162.\* The net result of allowing the contumacious witness to call the shots is to permit such a person to decide whether he is willing to face a jury with his accusations, or whether he wants the jury to have only the cold record of his prior accusations, given at the place and time he was willing to submit to cross-examination. We submit that the possibilities for manipulation of the criminal process by the unscrupulous witness are too great to permit the witness to set the rules and determine his own availability.

If the Court rejects our argument and decides that a witness can be rendered "unavailable" by his wilful refusal to testify, we submit the only way to insure that the recalcitrant witness is not trifling with the Court is to confront him with and impose severe enough sanctions to deter him from making himself unavailable whenever it suits his own purposes. Since this was not done below, the judgment must be reversed.

A. The Tenth Circuit Cases Holding That the Contumacious Witness Renders Himself "Unavailable" by Reason of His Illegal Refusal to Testify, are Pernicious and Should Not be Followed

At common law, a witness was unavailable only if he was dead or out

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\*/ United States v. Wilson, 488 F2d 1231, Cert. gr., May 13, 1974, docket no. 73-1162.

of the jurisdiction, with no process available to compel his presence.

5 Wigmore, Evidence, Section 1404. These are only "conditions of necessity" (5 Wigmore, supra, Section 1401 p. 147) rendering a witness unavailable which the Supreme Court has never recognized. Mattox v. United States, 156 U.S. 237 (1895) (witness dead)<sup>\*/</sup>; Mancini v. Stubbs, 408 U.S. 204 (1972) (foreign national beyond the jurisdiction of the court, with no statutory or other power to compel attendance).<sup>\*\*/</sup> In other situations, where witnesses could not be called merely because of inconvenience, the Court has refused to hold that they were nonetheless unavailable. See Barber v. Page, 390 U.S. 719 (1968) and cases cited *infra*, p. 116 .

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<sup>\*/</sup> Terminal illness permanently incapacitating a witness is the equivalent of death (United States v. Hughes, 411 F2d 461 (2d Cir. 1969)), but not temporary illness. Smith v. United States, 106 F2d 726 (4th Cir. 1939); Peterson v. United States, 344 F2d 419 (5th Cir. 1965). Where the incapacity is only temporary, the government must either seek an adjournment of the trial or proceed, but forego use of prior testimony.

<sup>\*\*/</sup> The Stubbs situation is very limited. See United States v. Edwards, 469 F2d 1362 (5th Cir. 1972), where the Court held that a witness in military service in Germany was not unavailable under Stubbs, since he could be brought back within the jurisdiction and that the cost of doing so was no reason to do away with the right to confront him at the trial in question, even though he testified and was cross-examined at two prior trials.

In this case, when Weiner attempted to avoid appearing, the trial court issued an arrest warrant and assigned a postal inspector to guard him throughout the night to assure his attendance the next morning. (T 1312-13)

In the one comparable situation to the case at bar, where a witness accused co-conspirators at the preliminary hearing (where he was fully cross-examined by defense counsel), but wilfully absented himself from the trial by escaping from rather lax Government custody, the Supreme Court refused to hold that the witness was unavailable and reversed the conviction because his prior testimony had been read into the record. Motes v. United States, 158 U.S. 458 (1900)

Thus, the few situations in which a witness is deemed unavailable are those in which there is no real possibility that the witness has manipulated the situation in order to suit his own purposes.<sup>\*/</sup> However, if an otherwise available witness can make himself unavailable merely by deciding not to testify, then manipulation of the law by the unscrupulous becomes a clear and present danger.

Any witness who is part of a milieu where cooperation with the Government reputedly is punishable by death, can plan on giving testimony in a deposition <sup>\*\*/</sup> or preliminary hearing to see what he can get for his cooperation, then restore himself to the good graces of his confreres in crime, by refusing to testify at the trial and taking a little extra time for contempt. A witness' fear of mob reprisals to himself or his family has been deemed a mitigating factor

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<sup>\*/</sup> Granted that a witness may commit suicide or uproot himself and go abroad only to escape testifying a second time, but the possibility of someone taking such drastic action is remote enough to be deemed theoretical.

<sup>\*\*/</sup> Testimony given in a deposition can be introduced in a criminal trial if the witness later becomes unavailable. See United States v. Singleton, 460 F2d 1148 (2d Cir. 1972)

in contempt sentencing. United States v. Levine, 288 F2d 272 (2d Cir. 1961) Consequently, any mob figure has built-in mitigation whenever he decides it is to his advantage to stop cooperating and start acting contumaciously.

Additionally, the contempt sanctions available to bring the recalcitrant witness into line are rather feeble. No matter how many times the witness wilfully refuses to answer questions, if he makes it known at the outset that he will refuse to answer all questions, he is guilty of only one contempt.<sup>\*/</sup> Yates v. United States, 355 U.S. 66 (1957). Summary civil contempt is the authorized means to coerce the witness into testifying. But, as the Government so forcefully argues in its brief to the Supreme Court in United States v. Wilson, *supra*, this sanction for a wrongful refusal to testify during trial is "futile" where - - as here - - the reluctant witness is already incarcerated. Government Brief, pp 15-16. And "even when a recalcitrant witness in a criminal trial is not already incarcerated, the civil contempt sanction is unlikely to provide a substantial incentive to obey the Court's order, since a criminal trial . . . is ordinarily of relatively short duration." *Ibid*.

Even when a criminal contempt sentence is imposed, it is subject to review by the Appellate Courts. We have found no case where such a sentence exceeded a year. Thus, while there is power to impose a contempt sentence of unlimited duration, the seasoned criminal knows that such power is never exercised. Moreover, once he is also aware that the Government will not be damaged by his contumacious refusal to testify, since his prior testimony can be read into the

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<sup>\*/</sup> Masiello knew this as his attorney and the trial judge both stated that Masiello's several refusals to testify constituted only one offense for which there could be only one punishment (T 1178).

record in lieu of his live testimony, then the possibility for manipulation by the unscrupulous witness becomes particularly acute. For, if the witness can avoid testifying without incurring the Government's displeasure, and in the expectations of relatively light punishment by the Court, then he is free to pick and choose his own forum and to give testimony only when it suits his own convenience.

Given the real possibility for manipulation by the unscrupulous witness, the paucity of strong judicial sanctions available to compel the defiant witness to testify, as well as the natural disinclination of prosecutors to ask for strong coercive measures against the recalcitrant witness, where his refusal to testify will not hurt the prosecution's case, due regard for the proper administration of justice necessitates disapproval of the Tenth Circuit cases relied upon by the Court below. Instead, this Court should hold that a witness' wrongful and contumacious refusal to testify does not render that witness "unavailable" so that other testimony, which the witness chose to give on a prior occasion can be read into evidence.

- B. Even if a Witness can Become Unavailable Because of a Wilful Refusal to Testify, Masiello Should not be Deemed Unavailable in this Case Since the Prosecution and Court did not use all Means at Their Disposal to Compel His Testimony

The Court allowed Masiello's defiance to continue for perhaps a week without taking any steps to demand that he testify. An extremely solicitous prosecutor was given several adjournments for the purpose of cajoling that witness, without any effort made by the Court to even confirm the accuracy of Masiello's representations about his wife, which the prosecutor was good enough to relate

to the Court, in the most sympathetic manner.

It is significant that these adjournments gave rise to speculation in the press about Masiello's alleged fearful reluctance to testify; and it was one of these articles that found its way to the sequestered jury (see Point I). Coincidentally, this was the very subject about which the jury was quite naturally speculating (See Point I - reference to Juror Chiang).

Given the possibility for manipulation of the judicial process by the unscrupulous witness, the only way to insure that the recalcitrant witness is not trifling with the Court, is to confront him with and impose severe enough sanctions to deter him from making himself unavailable whenever it suits his own purposes. Just as a witness cannot be permitted "to pick and choose" the questions he will answer from the stand (Yates v. United States, supra, 355 U.S. at 72), he should not be given the opportunity to pick and choose the time and place and circumstances under which he is willing to give any testimony at all. To paraphrase United States v. Bryan, 229 U.S. 323, 331 (1950), a direction to testify cannot be treated as an invitation to a game of hare and hounds, in which the witness must testify only if cornered at the end of the chase. The contumacious witness must be made to realize that he cannot impede the judicial process at his whim and refrain from testifying in the hope that testimony he gave on a prior occasion will be sufficient to secure whatever consideration he desires from the prosecution.

If the Court and prosecution do not use all means at their disposal to compel the witness to testify, then the witness should not be deemed unavailable

Pleau v. State, 38 N.W.2d 496 (Wisc. 1949).<sup>\*/</sup> This is the rule that is applied when a witness is outside the jurisdiction. A mere showing of unavailability is not enough: the prosecution has the burden of proving that it has utilized all means available for securing his attendance and despite such efforts, was unable to do so. Barber v. Page, supra, 390 U.S. at 723-726. In accord: Governor of Virgin Islands v. Aquino, 376 F2d 540 (3rd Cir. 1967); Holman v. Washington, 364 F2d 618 (5th Cir. 1966); United States v. Edwards, supra; Gorum v. Craven, 465 F2d 443 (9th Cir. 1972); Wilson v. Bowie, 408 F2d 1105 (9th Cir. 1969); Williams v. Maryland, 375 F. Supp. 745 (D. Md. 1974).<sup>\*\*/</sup> cf. Motes v. United States, supra. In accord, United States v. Singleton, supra, 460 F2d at 1153 ( 2d Cir. 1972), where use of prior testimony was permitted upon a showing that the witness "was actually unavailable and the reason for this absence was not attributable to wilful or negligent governmental action or omission . . ."

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<sup>\*/</sup> The Court reversed a conviction where prior testimony of a contumacious witness, who was not dealt with severely, was read into the record, holding:

"Where a witness for the state becomes hostile and refuses voluntarily to give testimony which he is capable of, it places a hardship on the prosecution. This, however, does not justify disregard of the rights of the defendant in order to overcome the state's difficulties. The trial court had the duty and the facilities to compel [the witness] to testify."

<sup>\*\*/</sup> In Williams, the prosecution was permitted to use prior testimony of a witness who had married and moved out of state, after detailing the steps it took to ascertain her whereabouts. Five years later a law student rechecked the same sources and located the witness without any difficulty. The court granted the writ, holding that the state failed to meet the burden of showing that prior testimony could be substituted for the live witness because she was unavailable.

We submit that insufficient sanctions were brought against Masiello to induce him to testify at the trial below and that it was, therefore, error to hold that his wilful refusal to testify rendered him unavailable.

In every case<sup>\*/</sup> involving a wrongful refusal to testify during trial -- except this one -- the Government has taken the position that:

"...in the context of a criminal trial, it is this swift sanction for criminal contempt (where the penalty is made provisional and "the witness therefore knows that a change of heart may lead to reduction or even elimination of the penalty and may, accordingly, be motivated to provide the needed testimony") that is more likely to be effective in coercing obedience to the court's orders than the traditional coercive sanction of civil contempt." Government Brief, p 15, United States v. Wilson, supra.

Despite its otherwise unwaivering position on the proper means for coercing testimony from the recalcitrant witness, the Government did not ask the trial court to resort to the effective sanctions in this case -- even though defense counsel urged the court to inform Masiello he would be subject to severe penalties should he refuse to testify (T 789). Indeed, when Masiello's reluctance was first disclosed, the prosecutor was unsure whether he would even compel his testimony. (T 789)<sup>\*\*/</sup> Instead, the Government acquiesced in the trial court's decision, first to cite Masiello for civil contempt, and then to impose the criminal sanction only after the trial was completed -- measures which it argues in Wilson do not provide "the best chance of overcoming the witness' recalcitrance." Government Brief, p 15.

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<sup>\*/</sup> See United States v. Wilson, supra, and United States v. Marra, 482 F2d 1196 (2d Cir. 1973).

<sup>\*\*/</sup> "...He has gotten immunity and I suppose that means there may come a time when I could compel him to testify. I don't know whether I am going to do that..." (T 789).

Although the Court did inform Masiello that the sentence would be more than six months, the bite was taken out of this when the Court told Masiello's attorney that whatever sentence he imposed would be "under the same provisions of the law which were used by the other two judges when you were sentenced before, namely 4208, subdivision 2, which gives the Parole Board the right to fix the time." (Contempt Proceeding, July 22, 1974, pp 8-9) As the prosecutor later acknowledged, since "it was an A-2 sentence, . . . technically he could be out on the street . . ." (Min. Oct. 8, 1974, p 16). In real terms, the trial court did not subject Masiello to any additional sanction for his contempt, nor did the Government ever urge that he be severely punished for his wilful refusal to give testimony. Indeed, at Masiello's sentencing, the Government joined in Masiello's attorney's plea for imposition of a concurrent sentence (Contempt Sentence Minutes 7/26/74, p 10). Compare, United States v. James G. Martin, 74 Cr. 197, where a defendant testified in his own behalf and refused to answer one question on cross-examination on the ground he did not want to implicate another person in the crime. He received a six month sentence, consecutive to his one year term for tax evasion - - half again as much punishment for the wilful refusal to testify as for the crime.

In addition to this, Masiello was permitted to take advantage of a suicide attempt by his wife before the first trial as a mitigation for his refusal to testify, not at the first trial, but at the second. Apparently there were sufficient means available during the first trial to insure that Mrs. Masiello would not again attempt to harm herself and thus secure Mr. Masiello's peace of mind when he took the stand. No one ever attempted to take measures - - such as

twenty-four hour attendance by a matron or doctor, or physical restraint - - to achieve the same result at the second trial.

When the Government and trial court are eager to secure the physical attendance of a witness or defendant who claims illness as an excuse, a whole panoply of coercive measures are available to get the person into Court. For instance, in United States of America v. Marando, 73-1908, which was before this Court on two petitions for mandamus, the defendant, who suffered from chronic coronary insufficiency, and who had been sent to Bellevue from West Street because of a possible heart attack, was unhooked from the electronic cardiac monitoring machines at Bellevue, by marshals, over the protests of the medical staff, and brought to Court in an ambulance.

In the instant case, the co-defendant was ordered to appear daily in the courtroom, although his condition was serious, because the Court wanted to know whether he had a lawyer and whether he was well enough to proceed. Marshals were ordered to deliver him to the Court and take him home. Surely medical measures were available to prevent the risk of another suicide attempt by Masiello's wife and to compel his presence at the second trial, if the Government and the Court below had wanted to use them.

While Masiello's absence at the second trial did not detract in any way from the Government's case, it certainly redounded to appellant's detriment.

Appellant testified he had no reason to suppose Masiello was anything other than a respectable businessman. The jury never saw Masiello and had no basis for knowing whether appellant was telling the truth. Himmel, appellant's former law partner, had not testified at the first trial, and Masiello was not

available to be cross-examined as to how Himmel obtained his phone number and under what circumstances Himmel met him.

The documents relating to Masiello's reliance on the good will of the prosecutor to secure his early parole were not available at the first trial, nor had Masiello been sentenced in the Connecticut District Court case. No cross-examination was possible on the real extent of Masiello's expectations of favor in return for his cooperation, as it was revealed after the first trial.

Joe Brasco had been severed after Masiello testified and was not a defendant at the second trial. The Government insisted, over defense objection, that all the cross-examination be read to the jury. Appellant was saddled with the strategic decision of another lawyer acting in the best interest of another defendant at an earlier time. Defense counsel's objection that the read-back should be disallowed because there was no longer an identity of parties, was well taken and should have prevailed (T 1122). Moreover, because the Government insisted that the whole cross be read in, the totally irrelevant and highly prejudicial testimony from the first trial concerning Masiello's being guarded by marshals with shotguns was read to the jury (See Point VI).

The evil of reading testimony about shotgun guards around Masiello was highlighted by his absence from the courtroom. The testimony that was read to the jury made it clear that Masiello was in danger of being killed. It also made it clear that in the first trial, when Masiello testified in person, marshals were sitting in the courtroom for his protection. These marshals were in plain clothes, sitting anonymously with the audience, until their presence was dramatically revealed at the close of Masiello's testimony.

How pregnant with sinister significance was Masiello's absence during the second trial and his testimony being given by proxy, without armed guards, while the proxy was reading Masiello's testimony about the armed guards in the first trial.\* /

Given the Government's failure to resort to the means it had available to secure Masiello's live testimony, and the resultant prejudice to the defense, it was error to read his prior testimony into the record. Just as in Motes v. United States, supra, where the Government failed to keep a witness in secure custody and the witness escaped, the Government here failed to take reasonable measures to compel Masiello to testify. The judgment below should therefore be reversed and a new trial ordered.

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\*/ The manifest prejudice created by the fact that the Government was allowed to use a stand-in in lieu of Masiello, was reflected in juror Purpo's statement to Mr. Barbarino that if Masiello had testified Mr. Brasco would have been acquitted. (Barbarino aff. p. 6)

## POINT V

THE COURT BELOW ALLOWED THE PROSECUTION TO PRESENT TO THE JURY IMPERMISSIBLE INFERENCES, HEARSAY DECLARATIONS AND OTHER IRRELEVANT BUT PREJUDICIAL MATERIAL, SO AS TO DENY THE APPELLANT HIS FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION, HIS SIXTH AMENDMENT RIGHT OF CONFRONTATION, AND HIS RIGHT TO A FAIR AND IMPARTIAL TRIAL.

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### Evidence Which Infringed on the Appellant's Rights Against Self-Incrimination Under the Guise of Showing Consciousness of Guilt

In both the first and second Brasco trials, the government, through the direct testimony of prosecution witnesses, was allowed, over vigorous defense objections, to bring out that Brasco had refused to make his statement to the F.B.I. in 1970, under an oath. The government's aim through the use of such testimony was to show that Brasco, being a congressman and an attorney, refused to give a statement under oath because of his concern over a perjury charge. This fact was thoroughly exploited by the government during summation (T 3185). The Judge instructed the jury that this could be considered as an indication of "consciousness of guilt" (753).

The government thereafter, in both trials, also placed into evidence, again over defense objection, Brasco's statement to the F.B.I. Further on, during the government's case, the court allowed the prosecution to read into evidence portions of the appellant's prior testimony during the first trial, dealing with his explanation as to why he changed the dates of his initial contact with A.N.R. in his F.B.I. statement from 1967 or 1968, to early 1968. The government also argued that Brasco failed to prove his innocence (3184) and failed <sup>to blow</sup> the whistle on Doherty (3235). The Judge <sup>in his charge</sup> further reminded the jury that Brasco refused to swear to the statement (A 90). The court below admitted the above testimony on the theory that the jury could consider it as false

exculpatory statements, evidencing consciousness of guilt, and he so charged the jury (T 2711; A 85; 88).

The courts, while acknowledging the admissibility of evidence showing consciousness of guilt, have also recognized its weaknesses and the need to restrict its application. Thus, in People v. Nowakowski, 221 App. Div. 521 (4th Dept., 1927) the court, at page 523, stated:

"Courts have long recognized that this inference, one of the simplest of human experience, may easily be pushed too far."

See also, Richardson on Evidence, 10th Ed. Section 167; People v. Leyra, 1 N.Y. 2d 169; 2 Wigmore, Section 278, 3rd Ed., page 121.

Judge Cannella, while recognizing the weakness of evidence indicating consciousness of guilt, made his rulings on the basis of his feeling that any prejudicial effect on the jury would be minimal and that the items in question might be of legitimate concern to the jury (T 732-738). It is respectfully submitted that the court below was incorrect in allowing the prosecution to present this type of evidence to the jury and, in fact, the appellant was substantially prejudiced by the court's action.

With respect to commenting on the Congressman's failure to give a sworn statement, besides the fact that Brasco indicated to the F.B.I. agents that the statement was to the best of his recollection and that they had a free rein to speak to members of his staff both in New York and in Washington, the fact is that there was absolutely no obligation on his part to give a sworn statement. On the contrary, at the time the statement was given in December of 1970, the New York statutory law forbid the taking of sworn statements from accused persons in preliminary proceedings. (See former

Code of Criminal Procedure, Section 198, now repealed). Other states similarly allow accused persons the right to make statements not under oath, 98 CJS 494. Judge Cannella himself stated/that under the same conditions he also would not have signed a statement under oath (T 737). In the case at bar, the Congressman had a constitutional right not to make any statement whatever and not to testify. Likewise, he was under no obligation to give a sworn statement.

The United States Supreme Court in Griffin v. California, 380 U.S. 609, clearly established the impropriety of commenting upon the failure of an accused to testify. Similarly, a comment regarding the accused's assertion of his right to remain silent when questioned at the time of police investigation has also been held to be constitutionally impermissible. People v. Rutigliano, 261 N.Y. 103, Johnson v. Patterson, 475 F. 2d 1066 (10th Cir., 1973); United States v. Bridges, 499 F. 2d 177 (7th Cir. 1974); Deats v. Rodriguez, 477 F. 2d 1023 (10th Cir. 1973); People v. Theisen, 199 N.W. 2d 832 (Mich. Ct. App. 1972), Miranda v. Arizona, 384 U.S. 436 (1965). In Miranda, supra, the Supreme Court stated at page 468, footnote 31:

"It is impermissible to penalize an individual for exercising his fifth amendment privilege when he is under police custodial interrogation and therefore the prosecution may not use at trial the fact that he stood mute or claimed his privilege in the face of accusations."

Any comment on, or inference to be drawn from, a defendant's exercise of his right to remain silent has, in fact, been held to be of such a prejudicial nature that numerous courts have declared it to be constitutionally impermissible, even in cross-examination when the defendant took the stand. Thus, in United States v. Anderson, 498 F. 2d 1038, 1042 (D.C. Cir. 1974), and in Johnson v.

Patterson, 475 F. 2d 1066, 1068 (10th Cir. 1973), the court recognized that:

"Silence at the time of arrest is not an inconsistent or contradictory statement. Silence at the time of arrest is simply the exercise of a constitutional right that all persons must enjoy without qualification."

In the case at bar, the prosecution from his initial opening informed the jury that Brasco had failed to swear to the truth of the statement given to the F.B.I. and then extracted the same information from a witness during his presentation of the government's direct case. Thus, none of the comments made could in any way be supported as coming within the doctrine of Harris v. New York, 401 U.S. 222 (1971). (See United States v. Ramirez, 441 F. 2d 950 (5th Cir. 1971), United States, ex rel. Burt v. New Jersey, 475 F. 2d 234 (3rd Cir. 1973).

In People v. Ellis, 421 P. 2d 393 (Cal. Sup. Ct. 1966), Judge Traynor in a learned decision regarding the propriety of commenting on the failure of a defendant to submit to voice identification, clearly distinguished between evidence of testimonial communication and circumstantial evidence indicating consciousness of guilt. In the case at bar, the appellant had a right not to say anything and also had the right not to make a sworn statement. If comment on the exercise of the fifth amendment right is barred, as indicated in Miranda, supra, then logically, comment on the fact that a person retained his right not to swear, is also barred. In the instant case, the failure to swear could not be given to the jury as indicating consciousness of guilt, because it itself was a perfectly legitimate and valid act. In United States, ex rel.

Macon v. Yeager, 476 F. 2d 613 (3rd Cir. 1973) the Third Circuit held it to be reversible error where a prosecutor attempted to imply to the jury that the defendant's call to his attorney at the time of his arrest indicated consciousness of guilt. In that case, the prosecutor told the jury:

"He got up the next morning and called his lawyer. These are the acts of innocence? You can judge by his own conduct."

Here, the prosecution argued to the jury that Brasco failed to swear when he spoke to the F.B.I. and the trial judge told the jury that consciousness of guilt could be inferred from his actions. The court in United States, ex rel, Macon v. Yeager, supra, stated that the relevant question was whether the defendant had been harmed by the State's use of the fact that he engaged in constitutionally protected conduct. The answer in the case at bar is certainly an emphatic "yes." The prejudicial effects of this type of comment upon a jury are overwhelming, particularly in a case where the evidence (as discussed in Point III) is, at best, thin and insubstantial.

There is thus simply no basis for assuming that the jurors rejected the prosecutor's admonitions that they should "remember his refusal to swear" (T 3185, 3242).

The government in the case at bar attempted to justify its position by stating that the congressman, by giving the F.B.I. a statement after being advised of his rights, in effect waived his privilege against self-incrimination. This argument is without merit.

To argue that by giving the F.B.I. a statement to the "best of his recollection," Brasco thereby opened the door to allowing the prosecution to impute sinister aspects to his failure to swear under oath is disingenuous and absurd and neither supported by law, logic, nor common sense. Justice Black in his concurring opinion in Grunewald v. United States, 353 U.S. 391, 425, aptly stated:

"There are no special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it. The value of constitutional privilege is largely destroyed if persons can be penalized for relying on them. It seems peculiarly incongruous and indefensible for courts which exist and act only under the constitution to draw inferences of lack of honesty from invoking a privilege deemed worthy of enshrinement in the constitution."

With respect to the F.B.I. statement, Brasco denied any involvement in the alleged conspiracy and therefore the introduction of this document in the government's direct case was also improper, it being neither an admission nor confession. Similarly, the reading of Brasco's prior testimony from the first trial was improper in that it related to his explanation of why he changed certain dates in his F.B.I. statement. This was not in the nature of a judicial admission, as indicated by the court (T 847-852). Although the general rule appears to be that prior testimony from an earlier trial can be read, even though the defendant fails to take the stand at the second trial, the testimony read must be otherwise admissible, i.e., a judicial admission, 5 A.L.R. 2d 1411 Section 4; Richardson on Evidence, 10th Ed., Section 214; Edmonds v. United States, 273 F. 2d 108 (D.C. Cir. 1959), cert. denied 362 United States 977.

Such testimony cannot be read or utilized for impeachment purposes prior to the defendant taking the stand. The court below, in fact, appears to have recognized its error in allowing the reading of the testimony from the first trial prior to the defendant taking the stand, because on a later occasion it specifically prevented the prosecution from reading further similar testimony until rebuttal (T 1890-1895).

The government's ploy was indeed clever. Portraying Brasco's statement to the F.B.I. as a false exculpatory statement, which under no view of the facts <sup>was, the</sup> it/government was able to convey to the jury the seemingly compelling, but false, inference that any claim of innocence by Brasco, inconsistent with the government's position, constituted a statement evidencing consciousness of guilt. The very act of asserting innocence is thus made to appear suspect and gives rise to an inference of guilt. The court reinforced the government by its erroneous charge on consciousness of guilt.

(A 88 ).

Vice

The/ inherent in the government's twisted logic is that the jury was allowed to infer guilt from the unproven fact that Brasco lied to the F.B.I., the proof of which is the very fact that the government must establish in order to prove its case. Although the government did not present a scintilla of evidence indicating that Brasco's statement was a "false exculpatory statement" they nevertheless argued to the jury that he was guilty because by contradicting their witnesses, he lied ipso facto.

In addition, the court instructed the jury that they might consider the statement to the F.B.I. as a false exculpatory statement and as an example of consciousness of guilt (A 88 ). The court in-

structed the jury that they might consider the statement made by the defendant during his testimony at trial,<sup>a</sup>/false exculpatory statement which was evidence of a consciousness of guilt. The above instruction was objected to during a long colloquy. (A 123-124). In a subsequent instruction to the jury in which the Judge gave<sup>in</sup> response to the objection, the Judge again referred to the in-trial testimony of the defendant and said:

...I also indicated the fact that there were three alleged meetings that the defendant denied. You might get the impression I was saying they were false exculpatory statements. They are not considered in that light. The principle of law is the same. . . ." (A 130-131)

The court indicated that if the jury found that if the meetings denied by the defendant on the stand did in fact occur, the defendant's denials could be considered a false exculpatory statement evidencing consciousness of guilt.

Appellant's objection to the above instruction as to the trial testimony concerning meetings is based on the same reasoning given above concerning the pre-trial statements given to the F.B.I.

The trial testimony of the appellant concerning meetings could not be considered falsely exculpatory any more than his not-guilty plea.

The Supreme Court has continually held that an error of constitutional dimension is not harmless if there is any reasonable possibility that it might have contributed to the verdict. Fahy v. Connecticut, 375 U.S. 85 (1963). The government has the burden of proving that the error complained of did not contribute to the verdict obtained. Chapman v. California, 386 U.S. 18 (1966);

Griffin v. California, 380 U.S. 609 (1964).

The Hearsay Declarations of Seth Brewer

During the trial the court below allowed Doherty to testify to statements allegedly made by Seth Brewer, another postal official, who did not testify. Brewer's alleged statements concerned themselves with his efforts to find a way to invalidate the June 1967 bids and Judge Cannella allowed their reception based on the reasoning that they constituted part of the hearsay exception relating to conspirators' declarations (T 158-160). This court in United States v. Puco, 476 F. 2d 1099 (2nd Cir., 1973) indicated that caution should be exercised by trial judges in allowing out of court statements of declarations to be heard by the jury because of the danger involved in denying a defendant his constitutional right to confrontation. Pointer v. Texas, *supra*, 380 U.S. 400. One of the factors held to be most significant in determining whether the hearsay exception must give way to the defendant's right of confrontation is the availability of the witness in question. Barber v. Page, *supra*, 390 U.S. 719, 85 Harvard L.R. 1378 (1972). The learned article in 85 Harvard Law Review, referred to by this court in Puco, postulates as a desirable rule that:

'The hearsay exception should not be applied to justify a failure by the prosecutor to call an available witness.'

The burden to produce an available witness is on the state and the defendant is under no obligation to do so. In Park v. Huff, 493 F. 2d 923, 931 (5th Cir., 1974) the court stated:

"Where an extra judicial declaration is used under circumstances such that the opportunity to cross-examine the declarant is essential to a defendant's right of confrontation it must be the government's burden to produce the declarant. Mere availability in the sense that the defendant could have subpoenaed him does not in our opinion suffice. (Simmons v. United States, 440 F. 2d 89 (7th Cir. 1971))."

In the case at bar Brewer was available to the prosecution and there was no reason whatever why the government could not produce his testimony, but instead the government improperly resorted to using Doherty to testify as to out of court statements attributed to Brewer. The impropriety of the court's ruling is further magnified by the fact that the court placed extreme restraints on the defense whenever any question of out of court declarations favorable to the defense arose (e.g. T 921-924).

Testimony of An Alleged Internal Agreement To Get a Finder's Fee From Masiello

Doherty and Weiner testified that Brasco was to receive part of the fee from the loan to be obtained for Masiello. Masiello knew a fee had to be paid but did not know that any part was to go to Brasco.

As we have argued, this evidence does not establish any criminal act and certainly no act of fraud upon the government. (See Point III).

Even assuming that the finder's fee arrangement somehow constituted a criminal act, it bore no relationship to the conspiracy charged in the indictment, nor was it an act in furtherance of the conspiracy. Masiello stated he knew nothing of the alleged finder's fee arrangement and the situation as alleged amounted, at worse, to a fraud upon Masiello, one of the co-conspirators. Defense counsel's

motion to exclude this irrelevant, but prejudicial testimony, was well taken and should have been granted (T 1898-1900). United States v. Bruno, 105 F. 2d 921 (2d Cir., 1939) reversed on other grounds, 308 U.S. 287; United States v. Peoni, 100 F. 2d 401 (2d Cir., 1938); United States v. Falcone, 311 U.S. 205.

Phone Calls to an Unidentified Weiner; The Letter Allegedly Written by Weiner's Finance Co. and Addressed to Brasco

During the trial the government utilized telephone company records of long distance calls made from Frank Brasco's congressional office and defense counsel largely consented to the introduction of the records of these calls when proper verification, such as by names and telephone numbers, was provided. At one point in the trial, however, the prosecution was allowed to inform the jury that telephone records revealed calls from Brasco's office to a "Weiner" in Baltimore, Maryland, on May 28, 1968, June 12, 1968, and June 20, 1968. The telephone number called was not available, nor was there any proof presented that the "Weiner" mentioned in the telephone records was the Joseph Weiner who testified during the trial (T 1378-1380). Defense counsel objected to this information being given to the jury and argued that Weiner being a common name, there was no adequate foundation established to warrant the admission of these calls. The introduction of these calls, the defense stated, placed the burden on the defendant of showing that the Weiner called was not the party in question and, in effect, the burden of proof was shifted from the prosecution to the defense, in a situation where years had passed and memories failed. Appellant believes that the evidence in question was improperly received. See and

compare People v. Sellinger, 265 N.Y. 149 (1934).

In a somewhat similar vein, the court also allowed into evidence a letter allegedly written by a Mr. Russo of Weiner's finance company and addressed to Brasco on June 22, 1968, referring to A.N.R. as Brasco's client, and inquiring about A.N.R.'s intention regarding the loan offer (GX 51; T 1548, 1556). Although Weiner could not state that the letter was in fact mailed, and Russo himself never testified, the court allowed the letter to be received by the jury on the basis that it showed Weiner's participation in the conspiracy and that it showed that Weiner's testimony on this point was not a recent fabrication. The court told the jury that the letter was to be considered by them for these two limited purposes and not for the fact that the letter had been mailed or for the truth of its contents (T 1374, 1377, 1545-1548, 3278).

In this regard the court below evidently had in mind the inadmissibility of the contents of the letter for the truth of the contents therein, keeping in mind the admonition of Justice Holmes in A.B. Leach & Co. v. Peirson, 275 U.S. 120 (1927), that:

"A man cannot make evidence for himself by writing a letter containing the statements he wished to prove. He does not make the letter evidence by sending it to the party against whom he wishes to prove the facts."

In reality, however, the likelihood of the jury disregarding the contents of the letter is remote and the prosecutor himself in his summation repeatedly referred to the <sup>contents of the</sup> letter in question over repeated objections (T 3208-3210).

### Overall Prejudice

In all of the above instances concerning the rulings of the court below, the testimony and evidence admitted was highly prejudicial and its legitimate probative value minimal. Professor Wigmore, in his treatise, even goes so far as to state:

Circumstantial evidence concededly relevant may nevertheless be excluded by reason of the general principle that the probative usefulness of the evidence is more than counterbalanced by its disadvantageous effects in confusing the issues before the jury, or in creating undue prejudice in excess of its legitimate probative weight. In either case its net effect is to divert the jury from a clear study of the exact purpose and effect of the evidence and thus to obscure and suppress the truth rather than to reveal it."  
(3rd Ed. Section 1904)

This court in U.S. v. Knuhl, 379 F. 2d 427 (2nd Cir., 1967) reached a similar conclusion and has stated that where the probative value is slight while the prejudicial effect is great the trial judge has a duty in the exercise of its discretion to exclude it (citing United States v. Byrd, 352 F. 2d 570 (2nd Cir., 1965). The prejudicial effects of the rulings below, in and of themselves, denied the appellant a fair trial and require a new trial.

## POINT VI

A DEFENDANT WAS DEPRIVED OF A FAIR TRIAL BY THE POLITICALIZATION AND SENSATIONALIZATION OF THE TRIAL THROUGH PREJUDICIAL REFERENCES TO THE MAFIA AND THROUGH ASSOCIATION WITH CONTROVERSIAL POLITICAL FIGURES.

In the case at bar involving the trial of a Congressman, the government made a conscious and concerted effort to take advantage of the Watergate fallout and to paint for the jury a picture of political corruption involving ties and relationships to organized crime. This despite the fact that the record is bare of any such actions or ties by the appellant Brasco, and where Gascello himself testified he never told Brasco of his underworld activities and where he acknowledged he would not testify in cases involving organized crime. Early in the trial the prosecution brought into the case the word "Mafia" and was allowed repeated references to it despite counsel's objections to the use of these highly inflammatory comments and his suggestion that the term "organized crime" be used instead (T 202, 274). The courts have clearly recognized the prejudicial overtones in the use of the word "Mafia" and in fact government agencies have been instructed to eliminate such references. In United States v. Lazarus, 425 F2d 628, 641 (1970), cert denied 400 U.S. 869, the court, although accepting the use of the term where a grand jury investigation on the issue was involved, nevertheless indicated that "there well may be cases where references in testimony linking the defendant to the Mafia may require the granting of a mistrial." Similarly in Gascello v. State, 205 SW 179 (Texas 1892) the court finding reference to the term improper, stated:

"What bearing the Mafia had upon this case is not apparent from the evidence and reference to it was intended to excite race prejudice or it had no meaning."

In the case at bar following references to the Mafia the prosecution then read to the jury contents of the F.B.I. report regarding Masiello's background and those of other officials of A.N.R. The portion read to the jury over objection stated that Masiello Jr. had been charged with first degree assault in connection with the fatal beating of one man and the blinding in one eye with multiple fractures of the face of another. Further, that Thomas McKeever had a lengthy criminal record dating back to 1933 with arrests for felonious assault, grand larceny and violation of the anti-racketeering statute. Masiello, Sr. was described in the report as being known as a prominent member of organized crime who appeared before the New York State Crime Investigation Committee on December 9, 1964, in connection with a loanshark operation and invoked his fifth amendment rights 48 times (T 631-632). During cross-examination under the guise of refreshing the recollection of Frank Brasco the prosecution also made repeated reference to newspaper articles which appeared in 1964 and 1967 relating to the underworld activity of Masiello (T 2627-2630). Masiello's criminal background was undisputed during the trial and was therefore totally irrelevant to the issues at hand. The purpose and effect of these actions by the government was clearly to engender prejudice against the appellant by bringing to the jury's attention highly emotional material intended to instill odium and fear.

The government continued its course of conduct by also bringing into the case the name of Meade Esposito, Brooklyn's Democratic County leader, and testimony that Brasco referred Doherty and Weiner to Esposito for the purpose of obtaining possible loans for other transactions through the Kings County Lafayette Trust Company where Esposito was an official (T 727, 761, 1355-1360). This was but another attempt to imply an improper association without proof thereof. This testimony was brought into the case despite the fact that no claim was made that the meeting of May 23, 1968 with Esposito was in any way related to A.N.R.

Government's exhibit 50 consisting of a letter allegedly written to Charles Vandever, Chairman of the Board of Kings County Lafayette Trust Company, was allowed into evidence in conjunction with Weiner's testimony regarding this matter (T 1361).<sup>\*/</sup> Not only did this letter contain hearsay statements to the effect that "Congressman Brasco requested that he forward the enclosed material about our corporation to your office", but the entire testimony regarding Esposito was totally irrelevant to the issues and merely designed to poison the jurors' minds with respect to sinister reference as to political associations of the appellant. This underlying motive of the prosecution is highlighted by the illogical position taken by the prosecutor in arguing his point on this matter. Mr. Shaw while first declaring "that he couldn't care less about Esposito as a name", then in the very next statement indicated that Esposito's name was relevant (T 1358). The court, after admonishing the prosecutor "if you don't care about his name it isn't relevant, if it isn't relevant its going into a political area" (T 1358), nonetheless eventually allowed references to Esposito's name to be heard by the jury. The significance of the intrusion of Esposito's name into the case by the prosecutor is made clearly clear by reference to defendant's exhibit 1 in support of the original motion for sequestration. There it is seen that newspaper articles had alleged that Esposito had played a role in arranging a trade-off between Congressman Brasco and Attorney General Mitchell in the fall of 1972 wherein Brasco was alleged to have voted against a proposal to have a House Banking and Currency Committee conduct an investigation into the Watergate question in return for the Justice Department dropping the investigation involving Brasco. These hearsay prejudicial and inflammatory statements were one of the chief reasons why the defendant required a sequestration order in the first place (see notice of motion and supporting affidavit).

<sup>\*/</sup> EX 50 contained a notation that the same information was forwarded to Meade Esposito.

Thus, the inflammatory consequences of the interjection of Esposito's name into the case by the prosecution becomes dramatically clear. In fact, it appears that one of the jurors, to wit, Gloria Chang, became of the opinion that the defendant was involved in the Watergate situation (Barbarino's aff'd., p. 7). Thus the shield to protect the jury from the Watergate fallout which the sequestration order was designed to prevent was in effect pierced by the government through their tactics. The letter to Vandever and references to Esposito were brought into the case despite the fact that no claim was made that the meeting of May 23, 1968 with Esposito was in any way related to A.H.P.

Further, during the testimony of Masiello, the prosecution was allowed to bring before the jury references that Masiello was being constantly guarded by marshalls with shot guns and that at the first trial they were in fact in the very court room where the case was being tried (T 1749, 1783, 1793, 1812). These tactics clearly offend the dignity and fairness of a trial in a United States District Court.

All of the above evidence was irrelevant to the issues at hand, and were designed and calculated to implant red herrings and prejudicial inferences in the minds of the jurors.

It is a fundamental principle of our criminal justice system that a fair trial in a fair tribunal is a basic requirement of due process. In Re Murcheson, 349 U.S. 133, 136 (1955). (See also Turner v. Louisiana, 379 U.S. 466, 471).

Statements or remarks of prosecuting counsel which are calculated to appeal to or evoke racial, national, religious, or other prejudice are universally condemned as violative of the right of one accused of a crime to a fair and impartial trial. 45 ALR 2d at 306, in commenting on the requisite guidelines to be followed in this connection, states:

" Such remarks should never be made in a court of justice by anyone and especially should they not be made by a sworn officer of the law whose duty it is to see that the defendant has a fair and impartial trial and that he be not convicted except upon competent and legitimate evidence. A district attorney should remember that it is not his sole duty to convict and that to use his official position to obtain a verdict by appeal to racial or religious prejudice or any other unfair means is to bring his office and the courts into distrust."

(See also, Burger v. United States, 225 U.S. 78, 88 (1935); Hall v. United States, 413 F2d 582, 583-584 (5th Cir., 1969); People v. Lovello, 1 N.Y. 2d 436.

CONCLUSION

For all the foregoing reasons, the judgment appealed from must be reversed and the indictment dismissed. Alternatively, the case should be remanded for a new trial.

DATED: Kew Gardens, New York  
January 31, 1975

Respectfully submitted,

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